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No. _____

In The

Supreme Court of the United States

October Term, 1994

PATRICK RUGIERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE JURY'S EXPOSURE TO NEWSCASTS TYING DEFENDANT'S LAWYER TO AN INVESTIGATION OF ORGANIZED CRIME, WHICH OCCURRED DURING DELIBERATIONS AND WAS SEEN OR HEARD BY TEN JURORS, DENY DEFENDANT A FAIR TRIAL WHERE THE TRIAL JUDGE REFUSED TO PRESUME PREJUDICE, AND CONDUCT A HEARING INTO OTHER ALLEGATIONS OF IMPROPRIETY BY A JUROR?

II.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING A MISTRIAL OR THE EXCLUSION OF TESTIMONY WHERE THE GOVERNMENT ABUSED THE SUBPOENA POWER, VIOLATED A SEQUESTRATION ORDER, AND RESORTED TO COERCIVE TECHNIQUES TO OBTAIN IMPORTANT CORROBORATIVE TESTIMONY FROM A WITNESS?

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OPINIONS BELOW

The opinions of the district court (Eastern District of Michigan, Southern Division), and the United States Sixth Circuit Court of Appeals are reported and unreported, and are contained herein at Appendix A-1, A-5, A-14, A-24, A-37 and A-48, respectively. The district court opinion regarding jury exposure is published at 804 F Supp 925, and the Sixth Circuit opinion is pending publication.

JURISDICTION

The United States Sixth Circuit Court of Appeals denied relief in an opinion entered March 22, 1994, and denied rehearing (and rehearing en banc) in an order entered on May 5, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

United States Constitution, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On or about November 8, 1990, a grand jury in the Eastern District, Southern Division of Michigan, returned an eight-count indictment against Defendant-Petitioner Patrick Rugiero and five others. Defendant was charged in five counts: count one alleging conspiracy to possess and distribute cocaine and heroin from about April 1, 1985, to the date of the indictment (21 U.S.C. §§ 846, 841(a)(1)); count two alleging distribution of 2004 grams of cocaine on January 8, 1988 (21 U.S.C. § 841(a)(1)); count three alleging distribution of 483.96 grams of heroin on February 24, 1988 (21 U.S.C. § 841(a)(1)); and counts five and six alleging, respectively, intimidating/threatening a witness, Thomas Wyman, (18 U.S.C. § 1512(b)), and carrying/using a firearm during crime of violence (18 U.S.C. § 924(c)).

Defendant was tried by a jury on a superseding indictment, containing the same five counts, along with two co-defendants, his brother Anthony Rugiero and Ara Basmajian. The remaining co-defendants, Thomas Jamil Ahmed, Lonnie Jordan, and Robert Ricketts pled guilty and testified as government witnesses (VII 7; XVI 5; XVI 153).[1] Trial was held before the Honorable Paul V. Gadola. Defendant was convicted of Counts I and II (conspiracy and cocaine distribution) and acquitted of the remaining charges (XXIV 15-98; XXVI 4-5). On October 6, 1992, he was sentenced to concurrent terms of thirty years in prison (S 89-100).

Defendant filed a timely appeal as of right, maintaining among other issues that jury exposure to extraneous information during deliberations about which the trial judge refused to presume prejudice, and prosecutorial abuse and coercion from which the government obtain important corrobative testimony, denied him a fair trial. In an opinion for publication dated March 22, 1994, a panel majority of the United States Court of Appeals for the Sixth Circuit affirmed Defendant's convictions and sentences, over the dissent of Chief Judge Merritt regarding the prosecutorial misconduct issue. In an order dated May 5, 1994, the panel majority again denied Defendant's timely petition for rehearing, over Chief Judge Merritt's dissent. Defendant's petition for rehearing en banc was also denied, without dissent, on the same date.

As outlined in opening statement and closing argument (II 28-41; XXII 4-94; XXIII 102-132), the government's

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[1] **The transcripts of the trial testimony are sequentially numbered and references to the trial testimony will be designated by Roman numerals followed by the page number(s). References to documents will be identified by the name of the document and then the page number(s).**

theory of the case was that Defendant began distributing fractions of an ounce of cocaine to, and through, high school and neighborhood acquaintances, in the areas of Dearborn and Dearborn Heights, Michigan, during the early dates of the charge conspiracy (II 29, 32-33; XXII 17-28, 34-39). The government theorized that Defendant continued, and headed, the charged conspiracy, and progressed to distribution of larger amounts of narcotics, eventually resulting in the delivery of about two kilograms of cocaine to an undercover informant and agents, through Thomas Wyman, on January 8, 1988 (II 35-36; XXII 44-49), and the delivery of about one-half kilogram of heroin to undercover agents, through Robert "Bubba" Culevski, on February 24, 1988 (II 35-39; XXII 44, 62-79). The government alleged that Defendant entered into a partnership with Thomas Jamil Ahmed and another for distribution (XXII 6, 38, 122-123); used his limousine service as a front, and its manager, Culevski, as his right-hand man (II 35-36; XXII 51, 83; XXIII 115); and was the source of supply for distributions by Wyman and others (II 35; XXII 50-53, 55-59, 83).

The government also alleged that Ahmed maintained a group of "goons" whom Defendant used, along with others, for collection of debts and acts of violence, resulting in a car shooting and bombing, beatings, and the robbery of a drug dealer (II 39-40; XXII 28-30, 39-40, 50-53, 80, 88-93; XXIII 108). The government further alleged that Defendant participated in acts of violence and obstruction (XXII 19, 31-32, 90), including the charged attempt to dissuade Wyman from providing information after his arrest for cocaine distribution on January 8, 1988 (II 35, 40-41; XXII 59-62).

The trial was extremely hard fought. While the government offered the testimony of forty-five witnesses,

the great bulk of these witnesses were self-described drug traffickers, whose credibility and testimony were seriously and significantly impeached. That the factual disputes raised by the evidence were close is demonstrated by the fact that, despite the number of government witnesses, and despite the trial errors complained of, Defendant was acquitted of three of the five charges against him, and his brother acquitted of all the charges. Since Defendant does not raise any issue regarding the sufficiency of the evidence to take the case to the jury, an extensive discussion of the testimony as a whole is not thought necessary. The particular facts relevant to each issue raised in this petition will be presented in the course of the arguments.

Defendant now timely petitions this Court for writ of certiorari under 28 USC § 1254(1).

REASONS FOR GRANTING THE WRIT

I.

THE JURY'S EXPOSURE TO NEWSCASTS TYING DEFENDANT'S LAWYER TO AN INVESTIGATION OF ORGANIZED CRIME, WHICH OCCURRED DURING DELIBERATIONS AND WAS SEEN OR HEARD BY TEN JURORS, DENIED DEFENDANT A FAIR TRIAL WHERE THE TRIAL JUDGE REFUSED TO PRESUME PREJUDICE, AND CONDUCT A HEARING INTO OTHER ALLEGATIONS OF IMPROPRIETY BY A JUROR.

This issue involves extraneous information from television news broadcasts, which made repeated references to a criminal investigation of Defendant's trial lawyer and organized crime figures, and which came at a most critical juncture in the trial —after testimony, argument, and instructions, and in the midst of jury

deliberations (XXIV 8-10, A-17–A-19)[2]. See, *United States* v *Thomas*, 463 F2d 1061, 1065 (7th Cir, 1972) ("The timing of the exposure was as important as the content . . . "). Consequently, "the safeguards of jury impartiality, such as voir dire and protective instruction", referred to in *Smith* v *Phillips*, 455 US 209, 217 (1982), were not available to check the spread of prejudice.

Court inquiry following jury verdicts revealed that ten of the twelve jurors had seen, or heard about, the broadcasts (XXIV 19-21, 23-25, 28-29, 36-37, 40-49, 50-56, 58-63, 67-74, 80-83, 86-89). Some of the jurors had even heard about the television reports from jurors in other cases in the jury assembly room (XXIV 20-21, 51, 55-56, 62), and from relatives and friends outside of the courthouse (XXIV 41, 59, 87). Jury recollection of the television news reports varied from "rumors" (XXIV 59), to "under investigation for some kind of charges" (XXIV 24), to "questioned for some charges" (XXIV 87), to "brought up on some kind of a charge" (XXIV 28), to "something to do with cashing checks and maybe money laundering" (XXIV 82), and finally to "being indicted for laundering money" (XXIV 37) and "running from the press" and "going to be brought up on indictment charges of embezzlement" (XXIV 69). However, the most disturbing aspect of the inquiry was the fact that the jury foreperson, Deborah Mayhew, reported, spread, and discussed these varying accounts with at least six other jurors in the jury assembly room, in the jury deliberation room, at lunch, and upon leaving the court-

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2 Transcriptions of two television newscasts were attached as exhibits to Defendant's motion for new trial and are contained in the separately-bound Appendix at A-66–A-68. Trial of this case was handled by the Organized Crime Unit of the United States Attorney Office. The same unit handled the investigation and prosecution of Defendant's trial lawyer. See, Criminal Case No. 92-80848, Eastern District of Michigan, Southern Division.

house (XXIV 28-29, 36-37, 51-56, 67-74, 81-82, 86-89). See, *Waldorf* v *Shuta*, 3 F3d 705, 711 (3d Cir, 1993).

The Sixth Circuit acknowledged that "Most of the jurors indicated that they had seen or heard about the television report or reports," and that "Some jurors indicated that the jury foreman [sic], Mayhew, had discussed the television information about Rugiero's attorney with other jurors." (Slip Op. at 3-4, A-50).

While the district judge and the Sixth Circuit panel relied chiefly on personal assessments and general denials by the jurors[3] to deny relief (XXIV 92-93; A-24, A-37; Slip Op. at 3-4, A-49–A-51), this record clearly establishes that at least one juror, probably the most important, was improperly and unduly influenced by the news reports. Her actions, related and confirmed by six companion jurors (XXIV 28-29, 36-37, 51-56, 67-74, 81-82), of repeatedly raising, spreading, and discussing the television reports, apparently "in excitement" (XXIV 73), constituted an independent source of prejudicial, extraneous information within the jury panel. The prejudicial effect on this one juror, the foreperson, was more than enough to deny defendant his Sixth Amendment rights to a fair trial, to confrontation, and to effective assistance of counsel. *See*, *Stone* v *United States*, 113 F2d 70, 77 (6th Cir, 1940), ("If a single juror is improperly influenced, the verdict is as unfair as if all were"). *Johnson* v *Armontrout*, 961 F2d 748, 751-752 (8th Cir, 1942); *United States* v *Angulo*, 4 F3d 843, 844 (9th Cir, 1993).

The Sixth Circuit was able to affirm by denying Defendant a presumption of prejudice clearly mandated by this Court in *Remmer* v *United States*, 347 US 227, 229 (1954) — "We do not presume prejudice has occurred

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3 See, *Mu'Min* v *Virginia*, 500 US 415 (1991) (Marshall, J., dissenting).

by reason of extraneous contact with a juror or jurors" (Slip Op. at 5, A-52). This ruling also appears to be in conflict with decisions by the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuit Court of Appeals in *United States* v *O'Brien*, 872 F2d 12, 14 (1st Cir, 1992); *United States* v *Weiss*, 752 F2d 777, 782-783 (2nd Cir, 1985); *Stockton* v *Virginia*, 852 F2d 740, 744 (4th Cir, 1988); *Drew* v *Collins*, 964 F2d 411, 415 (5th Cir, 1992); *United States* v *Sanders*, 962 F2d 660, 668 (7th Cir, 1992); *United States* v *Robinson*, 756 F2d 56, 59 (8th Cir, 1985); *United States* v *Littlefield*, 752 F2d 1429, 1431-1432 (9th Cir, 1985); *United States* v *Hornung*, 848 F2d 1040, 1044 (10th Cir, 1988); *United States* v *Caporale*, 806 F2d 1487, 1503 (11th Cir, 1986); *United States* v *Butler*, 822 F2d 1191, 1195, fn 2 (D.C. Cir, 1987).

Remmer and the above progeny presume prejudice for any jury exposure to extraneous information, whereas the Sixth Circuit stands virtually alone in requiring the accused to prove actual prejudice. *United States* v *Pennell*, 737 F2d 521, 529-534 (6th Cir, 1984) (Celebrezze, dissenting), *cert den.*, 469 US 1158 (1985); *United States* v *Zelinka*, 862 F2d 92, 94-96 (6th Cir, 1988); *United States* v *Walker*, 1 F3d 423, 429-431 (6th Cir, 1993) (Acknowledging that "there has been a split among the federal circuits with respect to the burden of proof," and noting that the "First Circuit appears to agree with this [Sixth Circuit] interpretation. See, *Neron* v *Tierney*, 841 F2d 1197, 1200 (1st Cir, 1988); *United States* v *DeLutis*, 772 F2d 902, 909 (1st Cir, 1983)."). *But see*, *United States* v *Augiulo*, 897 F2d 1169, 1183-1187 (1st Cir, 1990); *United States* v *O'Brien*, *supra* at 972 F2d 14.

This case is similar to *United States* v *Pennell*, *supra* at 737 F2d 532, where the Sixth Circuit conceded that "Were *Remmer*, *Ferguson* [486 F2d 968 (6th Cir, 1973)] and *Stone* [113 F2d 80 (6th Cir, 1940)] controlling, we

would be hard pressed to affirm." The appropriateness of such a concession alone would appear to warrant scrutiny of the split decision in *Pennell* by subsequent cases. However, there has been little or no analysis in the dozen or so cases citing to *Pennell*. *e.g.*, *United States* v *Zelinka*, *supra* at 682 F2d 95; *United States* v *Walker*, *supra* at 1 F3d 431. Accordingly, it is submitted that the time has come to scrutinize *Pennell* and resolve this conflict.

In *Pennell*, *supra*, 737 F2d 532, the Sixth Circuit concluded that *Smith* v *Phillips*, 455 US 209 (1982), "has indeed altered the law concerning unauthorized communication with jurors." However, it must be recognized in the first instance, and upon final analysis, that *Phillips* addressed the issue of intrinsic juror bias, not jury exposure to extraneous information. In *Phillips*, *supra* at 455 US 215-217, this Court pointed out that the beliefs, preferences, and biases of jurors may be exposed and checked by voir dire and cautionary instructions, and that defendant always retains "for allegations of juror partiality" the opportunity "to prove actual bias." In essence, this Court ruled "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible . . ." *Id.* at 216 (citation omitted). *Phillips* dealt chiefly with juror disqualification, unlike this case or *Pennell* itself. See, *Johnson* v *Armontrout*, *supra* at 961 F2d 952-753.

This same point was subsequently made by the Seventh Circuit in *United States* v *Littlefield*, *supra* at 752 F2d 1413, and in a law review analysis of *Remmer* and *Pennell*. "Clean sweep of the New Trial Safeguard Against Prejudice from Unauthorized Communications with Jury Members", 31 Wayne L Rev 1083, 1096-1098 (1985).

The Sixth Amendment guarantees criminal defendants the right to trial by an impartial jury. "No right touches more the heart of fairness in a trial." *Stockton* v *Virginia*, 852 F2d 740, 743 (4th Cir, 1988). Justice Holmes stated at the beginning of this century:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether private talk *or public print. Patterson* v *Colorado*, 205 US 454, 462; 27 SCt 556; 51 LEd 879 (1907)." (emphasis added).

It has often been held that where information contained in media reports came to the attention of jurors, the possibility of prejudice to the defendant from such exposure was fatal to conviction. See, *e.g.*, *Mattox* v *United States*, 146 US 140, 150 (1892); *Marshall* v *United States*, 360 US 310, 312-313 (1959) ("The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence.").

It does not require extended legal or factual arguments to show that media reports can also undermine the basic rights to confrontation and effective assistance of counsel. *See, Gov't of the Virgin Islands* v *Gereau*, 523 F2d 140, 150-151 (10th Cir, 1975); *Dickson* v *Sullivan*, 849 F2d 403, 406 (9th Cir, 1988). Nor does it break new ground to observe that a defendant's fate is intimately tied to the jury's view of his lawyer. In cases such as the one at bar, where the defendant does not testify, his lawyer is his only voice with the jury. His defense may often stand or fall on the jury's view of the credibility and integrity of his lawyer.

It is this fact of courtroom life which protects against a trial court's castigation of defense counsel, *United*

States v *Spears*, 558 F2d 1296, 1298 (7th Cir, 1977) ("the court's castigation of counsel so discredited him in the eyes of the jury that he could not have remained an effective spokesman for his client"), or interference with his efforts. *United States* v *Slone*, 833 F2d 595, 598 (6th Cir, 1987) ("Interference with the presentations of counsel potentially makes a mockery of a defendant's right to a fair trial, even in the absence of open hostility."). It is this fact of courtroom life which also prohibits government counsel from making personal attacks on defense counsel. *United States* v *Sblendorio*, 830 F2d 1382, 1395 (7th Cir, 1987) ("Attacks on the honesty and sincerity of defense counsel are improper."); *United States* v *McLain*, 823 F2d 1457, 1462 (11th Cir, 1987) ("To discredit defense counsel in front of the jury is improper, and even subsequent jury instructions aimed at rectifying this error may not ensure that the disparaging remarks have not already deprived the defendant of a fair trial.").

And indeed, it is this fact of courtroom life which may even require the disqualification of a defense lawyer where the jury may, through the evidence, learn of accusations regarding defense counsel which "will impugn severely his integrity and credibility in the eyes of the jury." *United States* v *Hobson*, 672 F2d 825, 828 (11th Cir, 1982).

Here, the television broadcasts posed a three-pronged threat to Defendant's right to a fair trial by providing extraneous information which was not only prejudicial to his right to an impartial jury, but which also undermined his rights to confrontation and effective assistance of counsel.

The Sixth Circuit would resolve such dangers by speculating as to the jury's thought and decision process — "The jury evidently disregarded any information they

may have heard about Rugiero's counsel — they acquitted Rugiero and and [*sic*] his brother Anthony on three counts." (Slip Op. at 9, A-56). This is indeed a slender reed on which to stake basic constitutional rights. A presumption of prejudice is needed to protect against the timing and nature of such extraneous information, if not to guard against "the appearance of impropriety." *See, Budoff* v *Holiday Inns, Inc.*, 832 F2d 1523, 1526 (6th Cir, 1984), where the Sixth Circuit itself stated:

> "*The presumption that the contact swayed the juror — who went on to the elected foreman of the jury* — on this close question of fact is not rebutted by his testimony that it did not; the human mind is too complex for us to fully understand and explain our actions, even to ourselves. *External and verifiable indicia of harmlessness are necessary to rebut this presumption.* On balance we believe the ends of justice are best satisfied by retrial of the case free from any outside contact that may have subtly influenced a juror's view of the case." (emphasis added).

Over and above this aspect, the district judge committed reversible error by denying inquiry into a note, which was written by another juror (Deborah Freelon), which came moments before the jury's verdict in open court. The note indicated among other matters:

> "Many stated they knew from the first day their verdict.
>
> * * *
>
> The verdicts were not based on impartial decisions by the majority of the jury.
>
> * * *
>
> Many focused their decisions on the fact that whether they will walk away with their hands clean or not. * * * "

The juror's note ominously concluded:

> "I have not been paid off or threatened, just had uneasy feelings the way this decisions [sic] were handled. A new jury should be picked." (XXIV 5-6, A-15–A-16).

The defense requested the court to make an inquiry of the juror[4] who wrote the note before taking any verdict, "as to the potential for improper influence in the jury room." (XXIV 6-8, A-16–A-18). The defense maintained that the note itself contained indications of extraneous information being brought into the jury room and deliberations. (XXIV 6-8, A-16–A-18; 43-45, 64-75, 92-96). The district judge denied the defense requests for inquiry of the juror who wrote the note based on F.R.E. Rule 606(b) (XXIV 11-12, A-19–A-21), being of the opinion:

> "In fact, no juror is even allowed to testify in a post-trial hearing as to what went on inside the jury room nor may a juror submit an affidavit." (XXIV 93-94).

To the contrary, in *Tanner* v *United States*, 483 US 107, 117-118 (1987), this Court made it very clear that extraneous influences occurring in the jury room were subject to inquiry and admission:

> "Lower courts used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible. *The distinction was not based on whether*

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4 Any assertion that this juror retracted her note by writing a second note (XXIV 4-8, A-14–A-18), is complicated by the fact that this juror stated a dissenting vote of not guilty as to count two upon an individual poll following the initial verdict (XXIV 64-66). The judge ordered continued jury deliberations on count two, over defense objection (XXIV 90-92, 96-99), and an unanimous guilty verdict was returned some two days later (XXVI 4-6).

> *the juror was literally inside or outside the jury room* when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation." (emphasis added).

Since this record lacks objective and verifiable assurances that these split verdicts, in this closely tried case, were unaffected by extraneous information or influence, this Court should grant certiorari to address this troublesome departure, and to resolve the split of opinion in the circuit courts.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING A MISTRIAL OR THE EXCLUSION OF TESTIMONY WHERE THE GOVERNMENT ABUSED THE SUBPOENA POWER, VIOLATED A SEQUESTRATION ORDER, AND RESORTED TO COERCIVE TECHNIQUES TO OBTAIN IMPORTANT CORROBORATIVE TESTIMONY FROM A WITNESS.

Over the dissent of Chief Judge Merritt, the panel majority was not persuaded by "defendant's vigorous argument" that the district judge abused his discretion or Defendant was prejudiced, stating:

> "We are not persuaded that the defendants have established these requirements in light of the substantial other similar evidence, equivalent to Milewski's testimony, and the wide discretion given the district court in making such a ruling. *See, United States* v *McClure,* 734 F2d 484, 495 (10th Cir, 1984)." (Slip Op 13-14, A-61).

This issue does not involve simply questions as to whether the judge abused his discretion regarding sequestration violations. Rather, it involves a course of conduct and a series of tactics by the government which were improper, coercive, and prejudicial. The

majority opinion does not adequately address the significance of this overall course of misconduct by the government, and its divided and narrow view of the issue facilitates what Chief Judge Merritt, in dissent, appropriately refers to as disposing of the issue by sweeping it "under the 'harmless error' rug." (Slip Op at 16, A-63). Had the majority taken a full view of the government's activities, and applied the appropriate standard of review, it would have embraced Chief Judge Merritt's conclusion that "This is such an obvious and notorious violation in this case that I would reverse and remand for new trial." (Slip Op at 16, A-64).

During the trial, the prosecutor was able to blunt the issues by delaying disclosure of all the facts until the very end of trial testimony, when it best suited his purposes. The facts, in their proper context, show that the government subpoenaed Keith Milewski on May 5, 1992 (XX 49), which was the second day of trial, and shortly after completion of jury selection (II 3). Milewski was not included on the government witness list submitted to the judge (XVIII 25). The government instructed Milewski that "you got to come whenever they [we] call you" (XX 49).

The record indicates that the government instructed Milewski to come to its offices or the courthouse on three separate dates, May 15, 1992, May 21, 1992, and June 2, 1992, without any intention of calling him to the stand (XIX 151-154). On the first two dates, the government questioned Milewski at its offices, and he denied involvement or knowledge regarding drug activities (XIX 151-154). On the first date, a government agent accused Milewski of lying (XIX 151-154). On the second date before re-questioning, Milewski entered the courtroom and remained for approximately one hour during Defendant's cross-examination of Thomas Wyman (XVIII 19-

21), a key government witness (XII 5-45). As the majority opinion notes, "Although the government was permitted more than one law enforcement agent [three (II 73)] to be present in the courtroom, no one detected Milewski's courtroom presence until some time had elapsed." (Slip Op at 9, A-56).

This incident was the subject of a defense motion for exclusion on June 8 and 9, 1992 (XVIII 18-34; XIX 6-9, A-1–A-4). The government denied any prior knowledge or participation regarding Milewski's presence in court, and the district judge accepted the government's representations and denied the motion to exclude Milewski's testimony (XIX 6-9, A-1–A-4).

However, the facts show that about one week earlier on June 2, 1992, the government planned and staged a confrontation between Milewski and Thomas Jamil Ahmed (XIX 154-161; XX 50-51), another key government witness who was in the midst of testifying (XI 13-166). Furthermore, Ahmed had been in the Witness Protection Program since 1990 (XX 6; XXIII 114-115), making such a meeting virtually impossible without the concerted effort of the government in violation of court ordered sequestration. See, *Miller* v *Universal Studios, Inc.*, 650 F2d 1365, 1373 (5th Cir, 1981).

On June 8, 1992, when the judge considered Defendant's initial motion to exclude Milewski's testimony because of his entry into the courtroom during defendant's cross-examination of Wyman, the trial prosecutor did not fully explain his maneuvers with Milewski's trial subpoena, or even mention the confrontation with Ahmed on June 2, 1992 (XVIII 26). The prosecutor instead indicated:

> "*To make a long story short*, we, at his request, got him a court appointed counsel and he came in Friday with his attorney, and at that time

> agreed for the first time to testify and tell us for the first time what it was he knew." (XVIII 26). (emphasis added).

It is obvious why the prosecutor did not want to tell the "long story", because to do so would have placed the government in direct violation of the sequestration order. But, one day later, on June 9, 1992, after Milewski's trial testimony as the last government witness suffered substantial impeachment during Defendant's cross-examination (XIX 150-156), the prosecutor did not hesitate to disclose the confrontation with Ahmed to bolster Milewski's credibility on redirect examination (XIX 157). The delay thereby had the added effects of undermining Defendant's cross-examination, and bolstering Milewski's credibility on redirect. The defense was relegated to scrambling for basic facts, in the presence of the jury, during recross-examination (XIX 159-160). A defense request for an immediate hearing outside the presence of the jury was deferred by the judge to the following day, June 10, 1992 (XIX 159-163), creating the opportunity for additional, problematic contact and communications between the government and Milewski (XX 22, 29-35, 46-48). The district judge denied a second defense motion for mistrial, or exclusion of Milewski's testimony, after closing argument and jury instructions (XXIII 189-199, A-5–A-13).

When Milewski entered the courtroom during Defendant's cross-examination of Wyman, he was not just another bored or confused witness waiting around to testify. The government told him to be there under the guise of a subpoena, without any intention of calling him to testify (XX 13-15). This was a situation fraught with temptation, and it was created by abuse of the subpoena power, since to subpoena a witness for a purpose other than to present his testimony in court is

"clearly unauthorized and improper." *United States* v *Keen*, 509 F2d 1273, 1274-1276 (6th Cir, 1975). Because the government improperly procured Milewski's presence at the courtroom door without guidance or caution, it cannot assert that it was entirely free of blame for his presence in the courtroom. *cf, United States* v *McClure*, 734 F2d 484, 495 (10th Cir, 1984). What Milewski heard and saw, regardless of subject matter, was the vigorous cross-examination of a key government witness. Much can be learned from such observations. Indeed, one of the purposes of the rule of sequestration is "preventing one prospective witness from being taught by hearing another's testimony". 6 Wigmore, *Evidence* (3d Ed 1940) § 1838, p 461.

Similarly, Milewski was not just an anxious witness who just happened to meet and talk with Ahmed, all of which just happened at an inopportune time. As the judge found, "we would have to all agree that was with the consent, connivance, and procurement of the Government." (XXIII 193, A-9). Once again it was the government's abuse of the subpoena power which facilitated the violation — he was required to appear, not for testimony, but as the prosecutor admitted, for the very purpose of arranging the confrontation with a witness who was, at that very time, on the stand and supposedly subject to the court's sequestration order (XX 16).

As Chief Judge Merritt stated in dissent:

> "The obvious purpose of this confrontation was to get Milewski to testify in a way that would be consistent with the testimony of the witness who was then on the stand. The witness on the stand told Milewski facts that the government wanted Milewski to testify to. Milewski then did so testify." (Slip Op at 16, A-63).

Due process clearly prohibits the government from using its authority to intimidate potential witnesses from testifying. *See, e.g., United States* v *Hammond*, 598 F2d 1008, 1012-1015 (5th Cir, 1979). By analogy, due process principles should also be held to prohibit the government from using improper means and coercive tactics to obtain testimony from individuals because such conduct undermines the integrity of the fact finding process. Private conversations, let alone a staged confrontation, can be subject to abuse by the government. *See, United States* v *Malik*, 800 F2d 143, 149 (7th Cir, 1986). In *United States* v *Smith*, 478 F2d 976, 979 (D.C. Cir, 1973), the Court warned that "even if the prosecutor's motives were impeccable", he must refrain from overreaching:

> "As the Supreme Court of Michigan observed in *People* v *Pena*, 383 Mich 402, 406; 175 NW2d 767, 768 (1970), '[a] *prosecutor may impeach a witness in court but he may not intimidate him — in or out of court.*' See also, *Bray* v *Peyton*, 429 F2d 500 (4th Cir, 1970); *People* v *Butler*, 30 Mich App 561; 186 NW2d 786 (1971)." (emphasis added).

The government is not, and cannot be, the sole arbiter of truth. It is impossible to know what Milewski's testimony would have been absent the government's coercive actions. Indeed, the government's heavy handed tactics made a mockery of Milewski's right not to testify at all, and the government ignores the fact that, absent such tactics, Milewski may have exercised that right (XX 54). Through a pattern of abuse, Milewski was cajoled and coerced into giving testimony which was strongly corroborative of Ahmed, whom the government called the "glue" holding its case together (XXIII 111).[5]

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5 It might be noted, as the panel majority did in turning aside Defendant's claim regarding jury exposure (Slip Op at 9, A-56), that

(concluded on page 20)

The panel majority, however, ignores the thrust of this issue altogether, and instead treats the matter as two separate and simple sequestration violations. This treatment facilitates the conclusion that, under the broad standard of review for sequestration violations enunciated in *United States* v *Gibson*, 675 F2d 825 (6th Cir, 1982), an insufficient showing of prejudice was made, "in light of the substantial other similar evidence, equivalent to Milewski's testimony, and the wide discretion given the district court in making such a ruling." (Slip Op. at 13-14, A-61).

Had the panel majority weighed the course of the government's misconduct by the standards appropriate to the resolution of constitutional violations, it would have recognized that reversal was compelled unless the government could demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v *California*, 386 U.S. 18, 24 (1967). Under the proper analysis, the panel majority would not be free to excuse the government's compliance with the appropriate procedural standards "in light of the substantial other similar evidence." As recognized in *Passman* v *Blackburn*, 797 F2d 1335, 1347 (5th Cir, 1986):

> "As stated in *Fahy* v *Connecticut*, 375 US 85, 86-87; 84 SCt 229, 230-31; 11 LEd2d 171 (1963), the issue is not 'whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.' Rather, the 'question is whether there is a reasonable possi-

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(*continued from page 19*)

Defendant was acquitted of charges relating to heroin distribution, witness intimidation, and firearm possession, and convicted only of charges relating to cocaine — the only charges upon which Milewski offered testimony.

> bility that the evidence complained of might have contributed to the conviction.'" (citations omitted).

In *United States* v *Solivan*, 937 F2d 1146, 1155 (6th Cir, 1991), the Sixth Circuit itself made clear that in reviewing claims of prosecutorial misconduct, courts should be guided by the standards relating to constitutional violation set forth in *Chapman* v *California*, *supra*.

The prosecutorial overreaching in the case at bar was obvious and repeated, and bespeaks the need, so clearly perceived by Chief Judge Merritt, for intervention by this Court. The heart of Chief Judge Merritt's dissent is the recognition that "As Mr. Justice Frankfurter often reminded us, the history of individual liberty is largely coincidence with the history of observing of procedural safeguards." *Spencer* v *Texas*, 385 US 554, 570 (1967). Respect for the rule of law as a body of normative principles requires this Court to look more closely at the instant course of prosecutorial misconduct, and obedience to the rule of law require that, in recognition of the scope and significance of that misconduct, this Court grant certiorari.

SUMMARY AND CONCLUSION

While the foregoing issues may at first blush appear to be at distant points on a spectrum, closer examination indicates that both jury exposure to extraneous information during deliberation and prosecutorial abuse and coercion to obtain testimony touch on the same basic concern — integrity of the fact finding process.

For the above reasons, this Honorable Court should grant Petition for Writ of Certiorari, and reverse Defendant's convictions and remand for new trial.

Respectfully submitted,

By: /s/ DOMNICK J. SORISE
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Dated: July 29, 1994

APPENDIX

FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

PATRICK RUGIERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX TO PETITION FOR CERTIORARI

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Prodeedings of June 9, 1992)

(UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK RUGIERO, ARA BASMADJIAN and ANTHONY RUGIERO, Defendants — Case No. 90-80941; HON. PAUL V. GADOLA)

PROCEEDINGS had and testimony taken during jury trial before the HONORABLE PAUL V. GADOLA, U.S. District Judge for the Eastern District of Michigan, on June 9, 1992, at 257 U.S. Courthouse, Detroit, Michigan.

APPEARANCES: RICHARD DELONIS, Assistant U. S. Attorney, Appearing on behalf of the Government; WILLIAM BUFALINO, ESQ., and N.C. DEDAY LARENE, ESQ., Appearing on behalf of Defendant Patrick Rugiero; JAMES D. O'CONNELL, ESQ., Appearing on behalf of Defendant Basmadjian; and DOMNICK SOURISE, ESQ., Appearing on behalf of Defendant Anthony Rugiero.

* * *

(XIX-6) * * * THE COURT: All right. Then we had the issue regarding the — the Rule 615 question. That is regarding my order that witnesses be excluded or sequestered until such time as their testimony was completed. It appears from what we've learned at this point that one Government witness, Mr. Keith Milewski, who was called to the stand on June the 8th had been

present in the courtroom for some time on a previous date and, in fact, the witness indicated that he was present in the courtroom for perhaps 45 minutes during the testimony of Thomas Wyman. It's clear that his presence in the courtroom would be in violation of the Court's order under Federal Rule of Evidence 615, which provides that:

> "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."

And it may make the order of its own motion.

The — the leading case in the Sixth Circuit on that particular point is *United States* v. *Gibson*, 675 F.2d 825, more specally pages 835 and 836. That's a 1982 decision in which the Sixth Circuit ruled that:

> "Violation of an order directing that witnesses be separated does not automatically bar the witnesses' testimony."

(XIX-7) The Sixth Circuit went on in that decision to say that:

> "A witness may be held in contempt and his testimony may be held open to the jury for comment to the jury, but exclusion of the testimony is within the sound discretion of the trial court."

The Sixth Circuit quoted *Holder* v. *United States*, 150 U.S. 91; it's a 1893 decision. *United States* v. *Pulley*, 922 F.2d 1283, at 1286, which is a Sixth Circuit 1991 decision.

The decision in *United States* v. *Ell*, 718 F.2d 291, at pages 293 and 294, states that — states that in part that:

> "Most authorities agree that particular circumstances sufficient to justify exclusion of a witness are indications that the witness has remained in court with a consent, connivance, procurement or knowledge of the party seeking his testimony."

That case was cited and relied on by the Sixth Circuit at page 836 of the *Gibson* opinion.

Now, in the *Gibson* case the witness was in the courtroom with the Government's consent and knowledge and was therefore excluded from giving testimony.

It's clear in this case, and I'm satisfied, and I don't think the defense as a matter of fact claims to the contrary, that the Government did not in this instance consent or connive or procure or have active knowledge that Milewski was in the courtroom. In fact, his presence in the courtroom (XIX-8) was not intended by the Government, and when it came to the attention of the Government that he was in the courtroom by happenstance, having apparently just wandered into the courtroom, he was directed at that point, immediately to leave the courtroom.

Beyond that, his presence in the courtroom was during the testimony of Mr. Wyman and — and Mr. Milewski has no knowledge of Wyman or no knowledge in involving the — any matters relating to Wyman. He was not a participant in those matters, and it's my understanding that his testimony related entirely different alleged transactions and happenings. If — if he had been a participant in the Wyman dealings and the Wyman transactions, then I think we might have a[*n*] entirely different situation.

As I think I've previously indicated to — to counsel during some discussion that we had in chambers, it seems to me that the — that the rule, that is Rule 615, is intended to impact upon the situation primarily where a witness is one of several witnesses to a transaction or to a happening or to some sequence of events. And then — and may have his own independent recollection of those events which may be divergent from the recollection of other witnesses, but then may have his testimony influenced or his memory refreshed

by hearing other people testify as to the — as to the same events or the same happenings.

(XIX-9) That does not seem to be the situation here at all. It does not seem to me that based upon the record that's been produced here that the — the Defendants are prejudiced in any manner by the brief presence of Mr. Milewski in the — the courtroom, which, as I say, is a presence that was without any consent or connivance or procurement or even knowledge of the Government that he was in the courtroom. So under those circumstances, I'm going — in the exercise of the Court's discretion I'm not going to bar the testimony of Mr. Milewski.

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Prodeedings of June 16, 1992)

(UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK RUGIERO, ARA BASMADJIAN and ANTHONY RUGIERO, Defendants — Case No. 90-80941; HON. PAUL V. GADOLA)

PROCEEDINGS had and testimony taken during jury trial before the HONORABLE PAUL V. GADOLA, U.S. District Judge for the Eastern District of Michigan, on June 16, 1992, at 257 U.S. Courthouse, Detroit, Michigan.

APPEARANCES: RICHARD DELONIS, Assistant U. S. Attorney, Appearing on behalf of the Government; WILLIAM BUFALINO, ESQ., and N.C. DEDAY LARENE, ESQ., Appearing on behalf of Defendant Patrick Rugiero; JAMES D. O'CONNELL, ESQ., Appearing on behalf of Defendant Basmadjian; and DOMNICK SOURISE, ESQ., Appearing on behalf of Defendant Anthony Rugiero.

* * *

(XXIII-189) * * * THE COURT: All right. Very well. The parties being satisfied with the exception of the Government's objection on the one instruction and which I ruled to the Defendants, we will proceed.

There's one other matter that the Court needs to take up. There was a motion for mistrial made previously in the proceedings and I think I may as well address that at this point.

On June the 10th, the defense made a motion for a mistrial or in the alternative, a motion to strike the testimony of Keith Milewski. The obvious preference was for the — was for the mistrial.

In this matter, just to relate a little background, on June the 9th, the Court had ruled that the testimony of Mr. Milewski could be received, despite the fact that he had been in the courtroom and listened to certain testimony in violation of the Court's order excluding witnesses from the courtroom, the order granted under Federal Rule of Evidence 615. Mr. Milewski, so it turned out, had inadvertently wandered into the courtroom and spent, perhaps, 45 minutes in the courtroom, listening and heard part of the testimony of (XXIII-190) Thomas Wyman. The Government then observed his presence in the courtroom, and he was immediately removed from the courtroom at that point.

The — there was a motion made to bar him or exclude him as a witness in this case, due to his presence in the courtroom on that occasion and that motion was denied on the — on the authority of the ruling in *U.S.* vs. *Gibson*, 675 F.2d 825, particularly at pages 835 and 836, which is a Sixth Circuit decision, 1982, in which certiorari was denied in 1982, at 459 U.S. 972, and also on the authority of *Holder* v. *the United States*, 150 U.S. 91 and 92 and *U.S.* v. *Pulley*, P-u-l-l-e-y, 922 F.2d, 1283, a Sixth Circuit 1991 decision.

The Court ruled, at that time, that the — that Mr. Milewski would not be barred as a witness in the case because, first of all, he did not know Wyman, he had no connection with Wyman or any knowledge of the matters to which Mr. Wyman testified, and thus, it did not appear that his testimony could have been influenced by hearing any — any portion of the testimony of Wyman. The testimony of Wyman and the testimony of Milewski were on totally divergent, different matters.

Secondly, the Government — the witness was not in the courtroom with a consent or a connivance or procurement or knowledge of the party seeking his testimony, that is to say, the Government. In fact, the

Government had him removed (XXIII-191) as soon as his presence was noted.

And third, of course, is the ruling in this circuit that the exclusion of the testimony of the witness for a violation of Federal Rule of Evidence 615 is within the sound discretion of the trial court and in the exercise of that discretion, I allowed his testimony to be taken.

Then, however, another problem arose, which is the matter that's involved in the motion for a mistrial. Mr. Milewski testified on June the 9th and on cross-examination by Mr. Larene and then on redirect examination by the Government, there was testimony adduced that he had previously lied to government agents, so he said, concerning his participation in drug trafficking matters. And also had lied to Attorney Larene, when Mr. Larene talked to him in a corner of the courthouse on the prior date, that is the previous date.

He — he testified that he later had changed his version of what he knew about this matter and had decided to tell the truth or what he then claimed to be the truth, after being confronted on the previous day by government agents and by the witness — by witness Thomas Jamil Ahmed. He indicated, testified, that he had met him in a room here, in the courthouse, with the government agents and with Mr. Delonis and with Mr. Ahmed. Mr. Ahmed, of course, had previously testified in this case and Mr. Ahmed had indeed testified to a relationship with Mr. Milewski and to his furnishing of some controlled (XXIII-192) substances to Mr. Milewski, so it's a different situation than existed regarding the — regarding the — Mr. Milewski hearing the testimony in open court of Mr. Wyman.

Mr. Ahmed testified that — that he knew Mr. Milewski and as I say, testified to some dealings that he had with Mr. Milewski, involving narcotics trafficking. The wit-

ness, Mr. Milewski, related that Mr. Ahmed told him in his meeting with him in this room, prior to Mr. Milewski taking the witness stand, that he, Ahmed, knew Milewski, knew where he lived, knew what kind of a car he had driven, knew the kind of musical instrument he played and knew of his role in — in receiving and selling drugs. And also indicated to him that the only way that he could help himself would be to tell the truth and also gave him some warning regarding the possibility of his being prosecuted for perjury if he denied any involvement in — in these drug transactions.

The witness, Mr. Milewski, testified that he asked to see a lawyer and consulted a lawyer and decided to testify and then related, what he then claimed on the witness stand, to be the truth, that is, that he was involved in matters that are charged in this case.

He first indicated on cross-examination by Mr. Larene, that Mr. Ahmed had not told him what Mr. Ahmed's testimony had been, but then under some further cross-examination, he indicated on a somewhat equivocal matter, that (XXIII-193) Mr. Ahmed may have mentioned to him some of his testimony. As I say, his testimony — his — his testimony on cross-examination and re-examination on that point were — were certainly not categorical. They were rather — it was rather equivocal and not entirely clear, but he did indicate that on cross-examination and redirect examination, that he may have been told by Mr. Ahmed, some things that Mr. Ahmed had testified to. And then, based upon that record, on June the 10th, Mr. Larene made a motion for a mistrial, claiming that the action of the Government in — in confronting him with Mr. Ahmed, who had previously testified, was a violation of the Federal Rules of Evidence, 615, and the Court's order under that rule.

Now, of course, here we have, as I've indicated, an entirely different situation because in contrast to the

first situation, which is the presence of Mr. Milewski in the courtroom for a while while Mr. Wyman testified, here the second situation, in which the confrontation with Mr. Ahmed occurred, we would have to all agree that was with the consent, connivance and procurement of the Government, because certainly the Government arranged for that meeting.

If indeed Mr. Ahmed did tell Mr. Milewski what his testimony had been, then also that would have produced — that would produce a different situation because it would seem that that certainly may well have influenced Mr. Milewski's (XXIII-194) testimony. Since contrary to the situation with Mr. — with Mr. Wyman, Milewski was directly involved in and connected with matters to which Ahmed testified and to which Mr. Milewski ultimately testified himself. And he did, in fact, change his story, having indicated before the confrontation with Mr. Ahmed that he knew nothing about these drug dealings and then after the confrontation, taking the stand and testifying that he was involved in — in those dealings.

Now, on June the 10th, Mr. Milewski testified in a separate record, however, that Mr. Ahmed had not told him what his testimony had been, but rather confined his remarks to telling Milewski that he knew who he was, that he knew his car, he knew his address, he knew the musical instrument that he — that he played, knew of his involvement in the drug dealing and warned him of the consequences of committing perjury.

Mr. Milewski testified that at that time, not only did he not know that Mr. — not only did Mr. Ahmed not relate what his testimony had been, but indeed, further testified that he did not even know that Mr. Ahmed had been a witness at all in the case. He said that he gathered that Mr. Ahmed may have — that there may have been the intention to call Mr. Ahmed as a future witness

in the trial, but that he had no knowledge that Ahmed had already testified and certainly, therefore, no knowledge of anything that Mr. Ahmed had said (XXIII-195) on the witness stand since he didn't even know that Mr. Ahmed had ever been on the witness stand.

Now, it seems to me that on a — on the basis of — among other decisions, *U.S.* v. *Greshner*, found at 802 F.2d 373, at pages 375 and 76, there — and such other decisions as *U.S.* v. *Johnston*, 578 F.2d 1352 and 1355 and the decision in *Perry* v. *Leek*, 488 U.S. 272 at pages 281 and 82, certainly this spirit, if not the letter of Rule 615 is violated, if — if a witness who has testified, then later relates his testimony to another witness, and it would seem, in this case, is indeed that had occurred, then the Defendants would be entitled to some relief. Query whether a mistrial would be appropriate or the striking of the — of the testimony, but it would seem that under those circumstances, some — some relief would be due the Defendants, if indeed, that did occur.

Even though — even though in this case, I might emphasize, in contrast to the situation that existed in some of the cases that were submitted to me, the Court did not specifically order a witness not to — not to disclose his testimony to a subsequent witness. The court, in several of the cases that I just mentioned, made the point that the — that the court was not asked to not only exclude the witnesses from the courtroom, but also asked to specifically inform witnesses that they were not to discuss their testimony after (XXIII-196) they had testified, with any other witness. That wasn't done here and that may change the situation somewhat.

However, it would still seem to me that there would be a violation, certainly, of the spirit if not of the letter of Rule 615, since certainly the Government, under those circumstances, must — would have to have been well aware that the whole purpose of the rule is to — is

obviated and nullified if the witness goes outside the courtroom and tells a subsequent — just everything that he, the witness, has said on the witness stand. If that — if that is permissible, then there's not [*sic*] point in ever barring the subsequent witness from the courtroom.

So I would think that if — if — if there's a finding that actually the testimony was related, then I think the defense would be entitled to some relief. Whether it would be a mistrial or not, I'm not going to state it at this point, but it would certainly seem that it would be logical that at least the testimony of the particular individual should have been — should be stricken from the record, under those circumstances.

Here, however, the Court finds, based upon the — all the evidence produced here, both when the witness — when the witness testified on the cross-examination and redirect examination and then on the separate record, that Mr. Ahmed did not relate his testimony or any of his testimony to Mr. (XXIII-197) Milewski. Rather he indicated to Mr. Milewski that he, Ahmed, knew who he was, knew that he was involved in drug trafficking and had trafficked in drugs with him and — and knew such things as the — as I've indicated before, what kind of a car he drove, where he lived, what kind of a musical instrument he played and that sort of thing. And also indicated to him that if he was called to the witness stand and committed perjury, he could be in some very serious trouble.

That seems to me is quite different from — from relating to the — to the subsequent witness, Milewski, what he, Ahmed, had already told the jury about Milewski or about any other aspect of this case. The record seems now to be clear that — that Ahmed did not relate any of his testimony to Milewski. In fact, Milewski didn't even know that he had been a witness, but suspected or — or — or speculated that perhaps

he might be called, at a later point in the trial, to be a witness.

So under those circumstances and in further light of the fact that there was no specific request made to, in this case, to bar a — a witness from discussing with another witness after he leaves the courtroom, his testimony — I don't think that's the major reason for my ruling, but it seems to be noted in all these cases, the court seems to make a point in several of these cases, as to whether or not the (XXIII-198) judge specifically instructed the witness that he must not discuss his testimony with any other witness after he left the witness stand. So that has some bearing, although I — that's not the major reason for my ruling.

Basically, it is, however, a slight factor, but the major point in my ruling is that I — I don't find that Ahmed did relate to Milewski what his testimony had been in this case, and therefore, under those circumstances and on the basis that the case law that I — to which I have referred, I'm going to deny the defense motion in that regard.

I did find it interesting that one — one district court in the Eastern District, Judge Tom Bertelsman, who's a very highly respected United States District [*sic*] judge, ruled that in 1982, in *U.S.* v. *Charstein*, 531 F. Supp. 460 at 464, that — that a judge shouldn't even attempt to enforce an order that restricts a witness from discussing his testimony after he leaves the courtroom. With all due respect to that jurist, I — I don't believe that I would go that far, but there is that one district court decision that has been cited in that regard, which would seem to indicate that a judges [*sic*] shouldn't even issue an order that goes beyond the letter of — of Federal Rule of Evidence 615.

In any event, for the reasons that I've indicated here on the record this morning, and on the basis of the

case authority that I've reviewed, I'm going to exercise my (XXIII-199) discretion under *U.S.* v. *Gibson* and permit the testimony of Mr. Milewski to stand.

That is our — that — it should also be added, however, and I'll say this for your benefit, Mr. Delonis, that I think that was a — as I think you previously indicated to you [*sic*], with some emphasis, I think it was a very risky proposition and if Mr. Ahmed had related portions of his testimony to Mr. Milewski, had even blurted it out, then the Government may have had a very serious problem, insofar as I'm concerned in this case. So it was a — it was a — it was certainly risky and I would think rather inadvisable operation for you to have had Mr. Ahmed in that room with Mr. Milewski before he testified.

MR. DELONIS: I appreciate that, Judge.

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Prodeedings of June 19, 1992)

(UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK RUGIERO, ARA BASMADJIAN and ANTHONY RUGIERO, Defendants — Case No. 90-80941; HON. PAUL V. GADOLA)

PROCEEDINGS had and testimony taken during jury trial before the HONORABLE PAUL V. GADOLA, U.S. District Judge for the Eastern District of Michigan, on June 19, 1992, at 257 U.S. Courthouse, Detroit, Michigan.

APPEARANCES: RICHARD DELONIS, Assistant U. S. Attorney, Appearing on behalf of the Government; WILLIAM BUFALINO, ESQ., and N.C. DEDAY LARENE, ESQ., Appearing on behalf of Defendant Patrick Rugiero; JAMES D. O'CONNELL, ESQ., Appearing on behalf of Defendant Basmadjian; and DOMNICK SOURISE, ESQ., Appearing on behalf of Defendant Anthony Rugiero.

* * *

(XXIV-4) Detroit, Michigan
Friday, June 19, 1992
10:11 a.m.

(Call to order of the court)

THE COURT: United States versus Patrick Rugiero, Anthony Rugiero, and Ara Basmadjian.

THE COURT: Good morning.

ATTORNEYS: Good morning, your Honor.

THE COURT: As I've previously indicated to counsel in chambers, yesterday just before five p.m. when the

jury was being notified that the — that they were excused for the day and should return this morning to continue their deliberations, there was an indication given that they'd reached verdicts in this case. They were advised that since at that hour the — it would not be possible to round up all the attorneys and — and conduct the proceedings — as a matter of fact, I just — I was on my way down into the parking garage, and they were unable to intercept me — they were told to return this morning.

When they arrived this morning down in the jury assembly room, one of the jurors handed a note to a Marshal, and that note was delivered to me. When the jurors came upstairs and went into their jury room here, a note then came from the jury.

(XXIV-5) The note that was handed to a Marshal down at — in the jury assembly room this morning before the jurors came up to enter their jury room to continue deliberations is before me at this time, and for the record, I will read the note. It has a line at the top that may not be part of the message itself, but it is a line at the top that says, and I quote:

> "Many stated they knew from the first day their verdicts."

Then — end of quote.

Then it goes on to say, and I quote:

> "Judge Gadola: I totally disagree with Count Two verdict for first defendant, and there is doubt about the second defendant. The verdicts were not based on impartial decisions by the majority of the jury. Many focused their decisions on the fact that whether they will walk away with their hands clean or not based on one person's notes, not their own. Several had feelings that the government didn't present a sufficient case to convict either one of them. Many

went along with the majority to keep down arguments. Many stated, 'This is bullshit. We don't want to be jurors any longer. Let's just get it over with.'

"I have not been paid off or threatened, just had uneasy feelings the way this decisions [*sic*] (XXIV-6) were handled. A new jury should be picked."

End of quotation.

The note that then was handed to my clerk from the jury room after the jurors came upstairs and went into the jury room to continue deliberations this morning reads as follows, and I quote:

"Judge Gadola: We have reached our verdict," signed "The Jury."

Then while counsel were in chambers with myself and I was discussing with them these two notes — that is, the note from the individual juror which had been handed to a Marshal downstairs and then the note that was handled — handed to my clerk from the jurors in their jury room a few minutes subsequent thereto — while we were discussing those two notes, then a third note was delivered, again to my clerk, and brought to chambers. That third note reads as follows, and I quote:

"Number One: Disregard Note. A unamimous decision has been reached,"

and end of quote.

So we have those three notes received. It's my intention at this time to call the jury into the courtroom and to inquire as to whether they have reached verdicts in this case. It's my understanding that — from our discussion in chambers this morning that counsel have requested that — that (XXIV-7) the juror who sent the — who handled the individual note to the Marshal downstairs be — be called in to court with counsel present and interrogated regarding the content of that note. Is that — is that correct?"

MR. LARENE: That was our request, sir, yes.

THE COURT: Would you like to state your position on that —

MR. LARENE: Yes.

THE COURT: —matter? Go ahead.

MR. LARENE: No, that — no, that is correct. Our position was that at this point the Judge — the Court should not take the verdict because, for one thing, I think it is not clear from the handwriting or from any other indicator that the person who wrote the note saying, "Disregard previous note," was also the same person who wrote the previous note, and we did have a discussion in chambers, and we did take the position and we do take the position that under the circumstances, the verdict should not be taken from this jury, that the juror — that an inquiry should be made as to the potential for improper influence in the jury room in that it appears that there are certainly indicators of that, although the notes are somewhat oblique, I suspect, but the — the jury — the jury should — the jury should not be permitted to return what might pass as a verdict. That was our position.

(XXIV-8) THE COURT: Mr. Delonis, do you want to put your position on the record?

MR. DELONIS: Our position is that the last note received makes reference to a previous note to be disregarded. In the context of what we have here, the only possible reference that could be is the reference to the note given to the Marshal earlier. This would indicate that there has been a unanimous decision, and I think the Court should proceed to take the verdict at this time, and I think that under Federal Rules of Evidence 606, as things stand at this point, there need not be any inquiry into the jury as to the process by which they reached their verdict.

I think the only area of inquiry, if there is to be any, is into the matter of whether or not they saw any of the publicity that involved Mr. Larene the night before last, and I would indicate for the record that this was brought to the Court's attention yesterday morning, and at that time it was decided to defer the matter until such time as the jury came to a resolution.

MR. LARENE: That — that's correct. I didn't ask that a record be made yesterday, but perhaps we should make it now.

THE COURT: Go ahead.

MR. LARENE: On Tuesday evening after the jury — while the jury — I'm sorry —

(XXIV-9) MR. BUFALINO: Wednesday.

MR. LARENE: — Wednesday while the jury was — after the jury was deliberating and apparently after they went home for the day, one of the local stations — I originally thought it was two; I now believe it was only one; I think it was channel 4 — ran a — I — I hesitate to call it a story, but in any event, ran something on the — apparently the five and/or six and/or eleven o'clock news, they featured a footage of me and a picture of a client of mine and the announcement that my client and myself were — my client being a man of some notorious name in the city — were being investigated by the federal government, and I understand, though I still haven't heard it, that they — it was reported that we were near — they were near bringing charges against myself and my client and that the — the charges were deferred until the end of a trial that I was involved in, presumably this one, that I was represented by lawyers from Washington and that the matter involved a business deal. I'm not sure what other details were offered.

I yesterday morning brought it to the Court's attention, and we discussed in chambers what — what, if anything, should be done and/or when it should be

done, and it was all — was agreed all the way around that the proper course of action would be to do nothing at that time but to wait, and in the event there were guilty verdicts on any of the counts, to (XXIV-10) make an inquiry of the jurors whether they had received any — or they had been aware of this publicity, and I guess then if any indicated "yes," to follow up as to whether any of this publicity affected the jury's deliberations and/or verdict.

I believe that's everything that's necessary, and I — I — we do request if there are any of the verdicts, if they are verdicts, are returned finding any of the defendants guilty, that such an inquiry be made.

THE COURT: All right. It's my understanding that the government does not object to the Court making that inquiry of — of the jurors in the event that verdicts are returned this morning?

MR. DELONIS: That's correct, your Honor.

THE COURT: Make an inquiry, in other words, as to whether —

MR. DELONIS: In a general —

THE COURT: — whether they are aware of — of that television broadcast and whether it had a bearing on or influenced their decision in the case.

MR. DELONIS: That's correct. I think the first question ought to be whether they are — have an awareness.

THE COURT: Awareness of the item, and if indeed they have an awareness, then the next inquiry would be whether that influenced in any way the — the verdict reached.

MR. LARENE: Whether it was discussed in the jury (XXIV-11) room —

THE COURT: Yes.

MR. LARENE: — and et cetera, yes.

THE COURT: All right. All right. Well, the Court will grant that request.

Now, insofar as the request that the juror who sent the individual note by the Marshal to me this morning is concerned, the request that that juror be interrogated as to matters that have occurred in the jury room, I believe that that matter is really fully explicitly covered by Federal Rule of Evidence 606(b). 606(b) provides as follows, and I quote:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, nor may a juror's affidavit or evidence of any statement by the juror concerning a (XXIV-12) matter about which the juror would be precluded from testifying be received for these purposes,"

end quote.

Now, under that rule, it's clear that the verdict of a jury may not be impeached by anything that went on inside the jury room concerning their deliberations or concerning the mental processes of — of a — of a juror. As a matter of fact, if there is a challenge to the jury's verdict, a juror is incompetent to testify, cannot be called as a witness to testify as to what went on inside that jury room as to their — their deliberations or the — the various possible arguments or pressures or whatever that may have been used to reach a verdict, and the Court cannot consider, as is explicitly stated, an

affidavit signed by a juror as any of those matters that went on within the — within the jury room.

Under those circumstances, since a juror is not allowed to testify as to those matters and since an affidavit from a juror cannot be considered by the Court as to matters that went on within the jury room, certainly the Court cannot then consider this note that was delivered here this morning from a juror indicating that the juror may not agree with — with a possible verdict in this case or verdicts.

The jurors, I assume, will — I assume that the jurors will be polled. I assume that there will be a request from one party or the other in this case for a poll of the (XXIV-13) jury after the verdicts, if indeed we have verdicts, are received. At that time, every juror will have the opportunity to state whether they agree or disagree with the verdict, whether it is their verdict or is not their verdict, and that would seem to totally safeguard the situation as to whether this one juror really has agreed to the verdict or has not agreed to the verdict.

Now, it's my understanding that counsel wish the Court to follow a — a rather unusual procedure in any poll of the jury. Is that correct?

MR. LARENE: Yes, sir. We had asked and would ask that in the event there are — that the Court — not — that the Court has expressed its intention to receive verdicts, that if — in the event that any of these verdicts are guilty as to any of the defendants, that the jury be polled and that the jury be polled on an individual basis with each juror being questioned outside the presence of the other jurors whether any such verdict was and is his or her verdict.

I also would ask and — as I believe I've indicated to the Court previously, that that — at that time, outside the presence of the other jurors, each juror be asked individually whether he or she received any notice as to

the publicity — to admit deliberation [*sic*] of publicity — and the — that the inquiry that we discussed at that time on an individual basis.

(XXIV-14) THE COURT: All right. Mr. Delonis, any comment — any response to that request?

MR. DELONIS: Our preference in the matter is that the jury be polled in the normal way, simply to have them deliver their verdict as a group and then be polled one at a time in each other's presence here in the courtroom.

THE COURT: I think in light of the fact that this note was handed to a Marshal this morning indicating some objection to a possible verdict on the part of a juror, the fact that that juror apparently was impelled to communicate that by a note to the Court, I think perhaps under the circumstances it is — it would be advisable to accede to the defense request and to poll the jurors on an individual basis.

I realize this is a very unusual procedure. I'm not aware of any case where it's been done, as a matter of fact. Certainly in my several years as a judge and my many years in the practice of law, I've never — I've never seen it done, and I think — I doubt if counsel has seen it done, but —

MR. LARENE: No. I think Mr. Sorise just thought of it this morning, Judge, but, frankly, I've never seen notes like this before today, so —

THE COURT: Well, I think the situation is somewhat unusual, and so I will grant that request. We will — we will — if there is a poll — if there are verdicts returned this (XXIV-15) morning and if there is a request for a poll of the jurors, then I will ask the jurors to return to the jury room, and then we'll call them into court one by one and ask them in the usual fashion whether the verdict is their verdict, and as that same time, then, I will make inquiry of them as to whether or not they have become aware of any publicity concerning you, Mr. Larene.

MR. LARENE: Thank you, your Honor.

THE COURT: All right?

Anything further to place on the record?

MR. DELONIS: Nothing further, your Honor.

THE COURT: All right. Let's bring the jurors into the courtroom, then. Then you can inquire of them whether they've reached verdicts.

I might also state for the record that copies of the three notes have been provided to all counsel in the case.

MR. DELONIS: Correct, your Honor.

MR. LARENE: That's correct.

(Pause in proceedings)

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Prodeedings of October 6, 1992)

(UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK RUGIERO and ARA BASMADJIAN, Defendants — Case No. 90-80941; HON. PAUL V. GADOLA)

TRANSCRIPT of Sentence before the HONORABLE PAUL V. GADOLA, U.S. District Judge for the Eastern District of Michigan, on October 6, 1992, at 257 U.S. Courthouse, Detroit, Michigan.

APPEARANCES: RICHARD DELONIS, Assistant U.S. Attorney, Appearing on behalf of the Government; WILLIAM BUFALINO, ESQ., and N.C. DEDAY LARENE, ESQ., Appearing on behalf of Defendant Patrick Rugiero; and JAMES HOWARTH, ESQ., Appearing on behalf of Defendant Basmadjian.

* * *

(20) * * * MR. LARENE: And I just want to make it perfectly clear that the prejudice, a showing of prejudice that I say, has been made, or bias, is that the foreman, the foreperson of the jury, has been shown to be affected and biased and prejudiced, that is the indicia of prejudice with respect to the news report. I — lest I be any less than crystal clear on that, I want to just say that. Thank you.

THE COURT: All right. Well, I will prepare and file a — a formal opinion regarding these motions made on (21) behalf of both Mr. Rugiero and Mr. Basmadjian, but I — I will indicate at this point my feeling and the thrust of

what the opinion will encompass when it is filed, and I expect that will be filed very, very shortly indeed.

We have a situation here, of course, in which on the 19th of June of this year, the Defendant Patrick Rugiero was convicted by the jury of conspiracy to distribute or possess with intent to distribute both cocaine and heroin.

On that same date, Mr. Basmadjian was convicted of that same conspiracy charge and he was also convicted on that date of distribution of heroin, a separate — a separate count. So as of that date, Mr. Basmadjian had been convicted on Counts 1 and 3 of the superseding indictment. And Mr. Rugiero had been convicted on Count 1.

Then on June the 23rd, following further deliberations, Mr. Rugiero was convicted of Count 2, being the count charging him with distribution of cocaine. So at that point, then, he stood convicted of Counts 1 and 2 and Mr. Basmadjian stood convicted of Counts 1 and 3. Mr. Rugiero was acquitted of — of Counts 3, distribution of heroin, Count 5, intimidating and threatening a witness and Count 6, the use and carrying of a firearm during a crime of violence which related to the charge of intimidating and threatening a witness.

The — the case had been submitted to the jury on the 16th of June for deliberations as to three — then three (22) Defendants, Mr. Patrick Rugiero, Mr. Basmadjian and Mr. Anthony Rugiero. Anthony Rugiero was, of course, acquitted of the two counts under which he was charged, which are Counts 5 and 6.

On the evening of the 17th of June, 1992, there were some local news broadcasts or telecasts that reported that one of Mr. Patrick Rugiero's trial counsel was a subject of a federal criminal investigation, that counsel being, of course, Mr. Larene. On the morning of June 18th, when this matter was brought to the Court's atten-

tion, I — the Court and counsel for the parties met in chambers to — for the purpose of discussing how to proceed in the light of that publicity, and it was agreed by counsel for all parties at that point, that the appropriate course would be to defer any inquiry of the jurors until such time that the jury deliberations had been concluded and any verdicts had been reached.

At the end of the court day, on June the 18th, 1992, the jury reported to the Court's clerk that they had — that they had reached verdicts. However, at that point, we were right at the point of, I believe, five o'clock or right in that very vicinity. Counsel had, I believe, departed and I was in the process of departing right at that point, so the — due to the unavailability of at least myself, and perhaps of counsel, the jurors were instructed to return to court the (23) next morning.

Then on June 19th, the next morning, while the jurors were en route from the jury assembly room downstairs, on their way up here to their jury room, one of the jurors handed one of the court's security officer[*s*] a note which contained some comments critical of the deliberations and of certain verdicts. That note didn't make — did not make any reference to the publicity which I've mentioned, the publicity involving Mr. Larene or to — nor did it make, in my estimation, any reference at all to any other extraneous occurrence having influenced the jury in its deliberations.

Shortly after the jurors had convened in their jury room, the jury sent a note indicating that it had reached its verdicts. And then a few moments later, and before the jurors came into the courtroom, another note came, written by the juror who had submitted the — the complaining note to the court's security officer while they were on their way outside arrived and that second note from that juror stated — asked that the — that her first note be disregarded and confirmed that unamimous decision on the verdicts had been reached.

It was at that point the defense counsel requested that the — that the Court, before receiving any verdicts, make an inquiry of the juror who wrote the notes regarding the proceedings in the jury room which had precipitated the sending of the — of the juror's notes.

(24) The — the Court, pursuant to Rule 606(b) of the Federal Rules of — of Evidence, denied this request for an inquiry of the juror who wrote the notes, since the notes gave no indication either that there was any extraneous prejudicial information which had been improperly brought to the jury's attention or that any outside influence had been improperly brought to bear upon any juror.

Rule 606(b) forbids inquiry of a juror regarding any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon — upon those deliberations or any other juror's mind — or any juror's mind, I should say or a motion — for a motion as influencing the juror to assent to dissent from the verdict, or any inquiry concerning the jurors' mental processes in connection with their deliberations and their verdicts.

As a matter of fact, the rule to which I referred states that a juror may neither testify to such matters, nor may an affidavit or evidence of any statement of the juror concerning such matters be received. The only exception[*s*] to that are, as I above stated, evidence of extraneous prejudicial information or outside influence — influence improperly brought to the attention of or to bear upon the deliberations of a juror. And in my estimation, the juror's notes did not so reflect or indicate.

Further, I might add, and in any event, the Court (25) had the opportunity, which was exercised, to make inquiry concerning these matters and the — and whether or not there were extraneous influences brought to bear upon any juror or upon any delibera-

tions of any juror, in the jury room, after the verdicts were returned and during the polling of the jury. And that is precisely the course that the Court did ultimately follow.

The — the jury then came into the courtroom and returned the verdicts, as reported by its foreperson. The jury announced that Defendant Anthony Rugiero was acquitted on Count 5, charging intimidating and threatening a witness, and then Count 6, the use and carrying of a firearm during a crime of violence.

Defendant Basmadjian was found guilty on Count 1, charging conspiracy and Count 3, charging distribution of heroin. And Defendant Patrick Rugiero was, as the verdict was announced at that point, found guilty on Count 1, conspiracy and was acquitted on Count 3, distribution of heroin, was acquitted on Count 5, charging intimidating and threatening a witness and was acquitted on Count 6, charging use of carrying of a firearm during a crime of violence. The foreperson also reported a verdict of guilty, as to Patrick Rugiero, on Count — on Count 2, I believe — or — yes, Count — Count 2, distribution of cocaine.

I might note that the — that the note from the (26) juror, the note to which I had referred, which was given to the court's security officer first thing in the morning of that date, and which the juror then subsequently repudiated, appeared, so I thought quite clearly, to refer to matters or statements which occurred or might have occurred during the course of the jury's deliberations; that is to say, that the note made reference that some jurors may have formed opinions in the early stages of the trial or that some jurors wanted to have clean hands at the conclusion of the deliberations. Or that some jurors wanted to bring their arguments to a close and get it over with, or that some jurors may have given undue weight to another juror's notes. Or that some

verdicts were not based on sufficient evidence and that some jurors were not convinced of the sufficiency of the Government's proofs, all matters, which seemed to me, were clearly covered by Federal Rule of Evidence, Rule 606(b) and were matters in which the Court has forbidden to make inquiry into the — into the deliberative processes of the — of the jury.

After these verdicts were received, on the morning of the 19th of June, I then proceeded to poll the jurors, but because of the — because of the information that had been brought to me that there'd been this television news item, concerning Mr. Larene, and also because of the fact that this note had come from the one juror complaining of some things which had gone on in the jury room, I polled the jury in quite (27) a different nature than is ordinarily conducted. Each jury [*sic*] was called into the courtroom individually and out of the hearing of all other jurors and was then questioned. And this was done in the presence of counsel for the various parties and in the presence of the Defendants.

The — I asked each juror whether he or she had been exposed to the publicity of June 17th, 1992, the television publicity concerning Mr. Larene, who, as I say, is the — one of the trial counsel for Patrick Rugiero. While a number of the jurors acknowledged having either seen or heard of that television news item, each and every juror advised the Court that the publicity had had no influence upon his or her decision. And in fact, there were certain jurors who expressed admiration for Mr. Larene, who is the subject of the — of the publicity.

The juror who had written the note to the Court, complaining about the jury's deliberations and had also sent the note then, retracting her complaint, indicated that her complaints about the deliberations were not motivated by any concern of extraneous influence and

further — and stated that she had — she had not been influence[*d*] herself by any publicity regarding Mr. Larene or by any other extraneous matter of — that — or prejudicial matter that had been brought into the jury room from outside.

The poll the jurors did, however, indicate to the (28) Court that the verdict, as to Patrick Rugiero on Count 2, was not unanimous, and therefore the Court did not accept the verdict of the — of the jury on that particular count and the jury was, instead, directed to continue with its deliberations regarding Count 2.

The jury returned, I believe, on June the 22nd; after being excused on Friday, June the 19th, the jurors returned on Monday, June 22nd and continued deliberations as to Count 2. And then on June the 23rd, 1992, the jury returned a verdict of guilty on Count 2 as to Defendant Patrick Rugiero. The jury was polled and it was apparent that the verdict at that point on Count 2 as to Mr. Patrick Rugiero was, indeed, unanimous and the jurors were discharged.

The counsel for the Defendants Patrick Rugiero and Ara Basmadjian have of course, filed a motion for a new trial on the grounds that the jury was prejudiced by the news report concerning Mr. Larene, which news item appeared on local television during the period that the jury was deliberating and also — and also on the basis of the statements made in the note given to the court's security officer by a member of the — of the jury.

So we've got really two arguments here. First, that the jury was prejudiciously — prejudicially influenced by television news reports broadcast during the jury's deliberations and that such prejudicial influence resulted in (29) bias against the Defendants on the part of the jury. And second, that the note from the one individual jury [*sic*] indicated that members of the jury possibly were being influenced by forces extraneous to

the jury's deliberations and — and by matter improperly brought into the jury room from outside and that these forces caused actual bias.

The remedy for, of course, for allegations of juror partiality is a hearing in which the Defendant has the opportunity to prove actual bias. The Court did conduct its own hearing by polling individually each and every member of the juror — jury, out of the presence and out of the hearing of all the other jurors. I was satisfied following that procedure that there had been no biased [*sic*] or no prejudice that was caused either by the television news item concerning Mr. Larene or the — or by any other outside influence or prejudicial matter that was injected from outside into the jury room, in which [*sic*] caused the note that was submitted by the one juror.

The — the Defendants certainly have the opportunity to request an additional hearing and to present what evidence they wish to present concerning actual bias, but no such evidence has been presented. If there, indeed, was outside prejudicial information that got into the jury room, then certainly a juror would be permitted to testify to those matters. But there has been no such testimony. There's been (30) no such — no affidavits of — to confirm that any such things have occurred submitted to the Court. There's been no information at all submitted to the Court to verify or support these claims on the part of the Defendants.

It is clear to this Court that it is the Defendant who has the burden of proving that any unauthorized communication with the jurors resulted in actual juror bias. That has been very emphatically held in this circuit by the — by the Court of Appeals in *United States* v. *Pennell* found at 737 F.2d 521 at page 532, a 1984 decision. The United States Supreme Court has so held in *Smith* v. *Phillips*, 455 U.S. 209, at page 215, a 1982 decision.

The — as I previously indicated to you in this case, the Defendant's concerns that the jury may have been exposed to unfavorable publicity as to Mr. Rugiero's trial counsel were brought to the attention of the Court, prior to the jury returning a verdict. The Court immediately responded to those concerns by meeting with counsel in chambers, and at that time, as I've stated, there was an agreement reached, that the jurors were to be questioned regarding their exposure to this publicity, if any, after verdicts had been reached, and consequently, when the jury returned with the verdicts, the jurors were questioned by the Court as to whether they had seen or heard the publicity and they all indicated either that they had seen the publicity, but it had (31) not influenced them at all in their deliberations or their verdicts, or that they had not seen it and were not aware of it. And as I've — now we've mentioned several times some of the jurors spoke with admiration of Mr. Larene.

So the Court does find that the questioning of the jurors, as to the effect, if any, of the — of the publicity, was sufficient to satisfy the requirement that — that a hearing be held when a defendant alleges juror bias. I discovered nothing during those proceedings that would indicate any bias and defense counsel have not requested any further hearing considering that matter, nor have they submitted any affidavits or — or made an offer of proof of testimony by any member of the juror — jury that there was any such actual bias.

Where the Court has heard the jurors' assurances of — of continued impartiality and total impartiality during the proceedings, the Court is entitled to rely upon those assurances in deciding whether a defendant has satisfied the burden of proving actual prejudice. And in this case, the Court does find, as I did at the time that the jurors were questioned, that the jurors'

answers were sufficient to satisfy me that no juror bias resulted from the publicity regarding Mr. Rugiero's trial counsel.

I also think that the fact that the publicity did not pertain to the Defendant, Mr. Rugiero, or to the (32) Defendant, Mr. Basmadjian, or to any matter at issue in this trial either directly or indirectly, but rather only related to a totally extraneous matter involving one of Mr. Rugiero's counsel, is further reason for the propriety of the Court relying upon the credibility of the jurors' assurances of — of a total lack of any bias or prejudice on their part.

The second argument made by the Defendants is that the note submitted by the one juror indicated that the jurors were being influenced by extraneous forces, and I cannot agree that that is the case. The contents of the note and, of course they've been submitted in the — in the — in the pleadings, that is, in the motion and in the briefs submitted by defense counsel in support of the motion for new trial, state as follows and I quote:

> "Many stated they knew from first day their verdict. I totally disagree with Count 2 verdict for first Defendant."

And it goes on and I'm not going to repeat it to you — filed it all, but as I've indicated they — the note states that the — that the verdicts focused on such things as whether or not the jurors will have "clean hands" at the conclusion of the trial, whether they relied on — whether some jurors relied on other jurors' notes, whether the Government had presented a sufficient case to convict, whether some jurors went along with other jurors to keep down (33) arguments, whether some jurors said they didn't want to be jurors any longer, they wanted to get the case over with, that sort of thing.

Now, the — the note made no reference whatsoever to any extraneous factor influencing the jury in its

deliberations. In fact, of course, the claim that some jurors had sort of made up their minds early in the trial, that their — that as to what their decisions would be sort of undermines the claim that anything contained in that television broadcast concerning Mr. Larene had anything at all to do with the conclusions ultimately reached by the — by the jurors.

I might further state, Mr. Larene, you urged that the Sixth Circuit Court of Appeals in the case of *U.S.* v. *Pennell*, which I've cited and which the U.S. Supreme Court denied certiorari in 1985, that the Sixth Circuit was in error in that decision in its ruling that the U.S. Supreme Court had in *Smith* v. *Phillips*, which I previously cited, had reinterpreted *Remmer* v. *United States*, so as to hold that where it is shown that a jury was exposed to extraneous information, the burden of proof is on the defendant to demonstrate actual juror partiality.

The *Remmer* case is found at two different places. It's found at 347 U.S. 227, at page 229 in 1954 and then it's found agein, the same case went back in — before the U.S. (34) Supreme Court in 1956 and there it's *Remmer* v. *United States*, 350 U.S. 377.

In — in the decision of those cases, the ruling seems to have been that where there was evidence that a jury had been exposed to some extraneous information, then the — there was a presumption of — of bias or prejudice and the Government was in a position where the Government had to rebut the presumption.

Mr. Larene, as I — as I've indicated, has urged that the Sixth Circuit is in error in its *Pennell* decision in its holding that the *Remmer* decision has been modified by *Smith* v. *Phillips*. I find that, in fact, it has been modified by *Smith* v. *Phillips* and that it's clear at this point that the — that the burden of proof is on the defendant to establish that the — that any extraneous information that comes to a jury's attention, in fact, is prejudicial to the offense.

I might further observe that the Sixth Circuit has more recently reaffirmed its ruling in — in *U.S.* v. *Pennell* and such subsequent cases as *U.S.* v. *Zelinka*, found at 862 F.2d 92, at pages 95 and 96, which is a 1988 decision.

So I do find that the burden of proof is indeed on the defendant to demonstrate actual juror bias or prejudice from any extraneous prejudicial information or improper outside influence. Here, there's been no such attempt, (35) on the part of the defense to — to — to demonstrate any actual juror bias or prejudice, despite the fact that that opportunity was available to the — to the Defendants. That is, certainly, a juror testimony or juror affidavits or other evidence that there was such bias or prejudice from extraneous information that might have been submitted to the Court and that has not been done, nor has there been any requests that the Court allow an opportunity for a hearing to produce any such evidence or affidavits or information.

I might further add that even — even if it be assumed that there is a presumption of bias or prejudice from extraneous information come to the jurors' attention, which is a proposition with which I do not agree and which I find that the Sixth Circuit doesn't agree and which I find that at present the United States Supreme Court doesn't agree, but even if that is assumed, in this case the ruling, from what I've heard of this case, would necessarily be that even in that circumstance the Government has met that sort of a burden because we've got a record here which demonstrates that all jurors say that there was no extraneous influence that was brought to bear upon their deliberations that prejudiced the Defendants in this case. The juror who sent the note and all jurors were closely questioned individually and out of the hearing of their fellow jurors and all of them have testified that no extraneous informa-

tion had influenced (36) their deliberations of verdicts and all confirmed that there was no improper outside influence that had been brought to bear upon any of them.

So accordingly and under these circumstances, the Court must deny the motions for a new trial. I — I'm going to reduce that to a formal opinion, but I just thought counsel ought to know right now that I reached that conclusion.

* * *

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL
[*Cite as* 804 F.Supp. 925 (E.D.Mich. 1992)]

(United States District Court —
E.D Michigan, S.D.)

(Dated October 16, 1992)

(UNITED STATES of America, Plaintiff, v. Patrick RUGIERO, and Ara Basmadjian, et al, Defendants — No. 90-80941)

Stephen J. Markman, U.S. Atty., by Richard L. Delonis, Asst. U.S. Atty., Detroit, Mich., for plaintiff; N.C. Deday Larene, Detroit, Mich., William E. Bufalino, II, St. Clair Shores, Mich., for defendant.

GADOLA, District Judge.

On June 19, 1992, defendant Patrick Rugiero was convicted by a jury of conspiracy to distribute, or possess with intent to distribute, cocaine and heroin. Also on June 19, 1992, and in the same proceeding, defendant Ara Basmadjian was convicted of conspiracy to distribute, or possess with intent to distribute cocaine and heroin, and of distribution of heroin.

On June 23, 1992, following further deliberations of the same jury within the same proceeding, defendant Patrick Rugiero was convicted of distribution of cocaine.

On June 23, 1992, the court issued a stipulation and order extending the time for filing a motion for new trial. On July 28, 1992, defendants filed this motion for new trial. On August 31, 1992, the government filed an answer to defendants' motion for new trial. Defendants Patrick Rugiero and Ara Basmadjian, on August 27, 1992 and September 4, 1992, respectively, filed motions for bond pending appeal of the issues raised in the defendants' motion for new trial.

FACTS

On June 16, 1992, at the conclusion of a trial before a jury, this case was submitted to the jury for deliberations as to defendants Patrick Rugiero, Ara Basmadjian, and Anthony Rugiero. On the evening of June 17, 1992, certain local news broadcasts reported that one of defendant Patrick Rugiero's trial counsel was the subject of a federal criminal investigation. On the morning of June 18, 1992, the court and the parties met in chambers for the purpose of discussing how to proceed in light of the publicity. All agreed that the appropriate course of action would be to defer any inquiry of the jurors until such time that jury deliberations had been concluded and any verdicts had been reached.

At the conclusion of their deliberations on June 18, 1992, the jury reported to the court's clerk that it had reached verdicts. Because of the unavailability of the court and the parties, the jurors were excused for the day and directed to return the next morning.

On June 19, 1992, while en route from the jury assembly room to the court's jury room, a juror handed a court security officer a note containing comments critical of the deliberations and of certain verdicts. The note made no reference to the aforementioned publicity nor to any other extraneous occurrence having influenced the jury. Shortly after convening in the jury room, the jury sent the court a note indicating that it had reached its verdict. Moments later, another note, written by the same complaining juror who had written the first note, was received by the court. The juror asked that her first note be disregarded and confirmed that, in fact, a unanimous decision had been reached.

Defense counsel requested that the court, before taking any verdict, make an inquiry of the juror who wrote the notes, regarding the proceedings in the jury

room which preceded the sending of the juror's notes. Pursuant to rule 606(b) of the Federal Rules of Evidence, the court denied this request for inquiry of the juror who wrote the notes, since the notes gave no indication either that any extraneous prejudicial information had been improperly brought to the jury's attention or that any outside influence had been improperly brought to bear upon any juror.[1] Rule 606(b) forbids inquiry of a juror regarding any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict, or concerning the juror's mental processes in connection therewith. A juror may neither testify to such matters nor may an affidavit or evidence of any statement of the juror concerning such matters be received. The only exceptions are, as above stated, evidence of extraneous prejudicial information brought to the jury's attention or outside influence improperly brought to bear upon a juror, and the juror's notes did not so reflect or so indicate. Further, the court had the opportunity, which was exercised, to subsequently make inquiry concerning those limited exceptions under Rule 606(b) after the verdicts were returned and during the polling of the jury, which of course took place after verdicts were reported.

The jury then returned the following verdicts, as reported by its foreperson:

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[1] The note from the juror to the court appeared to refer to matters or statements which had occurred during the course of the jury's deliberations, i.e. that some jurors may have formed opinions in the early stages of the trial, or that jurors wanted to have "clean hands" at the conclusion of the deliberations, or wanted to bring their arguments to a close and "get it over with," or that some jurors may have given undue weight to another juror's notes, or that some verdicts were not based on "impartial decisions by a majority of the jury," or that some jurors were not convinced of the sufficiency of the government's proofs.

1) Defendant Anthony Rugiero was acquitted on Count V (Intimidating a Witness) and Count VI (Use and Carrying of a Firearm During a Crime of Violence);

2) Defendant Ara Basmadjian was found guilty on Count I (Conspiracy) and Count III (Distribution of Heroin);

3) Defendant Patrick Rugiero was found guilty on Count I (Conspiracy) but was acquitted on Count III (Distribution of Heroin), Count V (Intimidating a Witness) and Count VI (Use and Carrying of a Firearm During a Crime of Violence).

The foreperson also reported a verdict of guilty as to Patrick Rugiero on Count II (Distribution of Cocaine).

The court then proceeded to poll each juror individually and out of the hearing of the other jurors, as to the reported verdicts. The court asked each juror whether he or she had been exposed to the publicity of June 17, 1992, regarding Patrick Rugiero's trial counsel. Many jurors acknowledged having seen or heard of the publicity, but each juror advised the court that the publicity had had no influence upon his or her decision; in fact, two jurors even expressed admiration for the trial counsel who had been the subject of the publicity. The juror who had written the note to the court complaining about the jury's deliberations and the note retracting this complaint, indicated that her complaints about the jury's deliberations were not motivated by concerns of any extraneous prejudicial information brought to the jury's attention or by any outside influence improperly brought to bear upon any juror; she further stated that she had not been influenced in her decision by the publicity regarding defendant Patrick Rugiero's counsel.

The poll of the jurors did indicate, however, that the verdict as to Patrick Rugiero on Count II was not unanimous, and the court therefore did not receive a verdict on that count. The jury was excused for the day and directed to return on Monday, June 22, 1992, to continue deliberations as to Count II.

On June 23, 1992, the jury returned a verdict of guilty on Count II as to defendant Patrick Rugiero. A poll of the jury disclosed that the verdict was unanimous, and the jurors were discharged.

On July 28, 1992, as noted above, the defendants filed a motion for a new trial on grounds that the jury was prejudiced by the news reports or by other extraneous forces which allegedly were alluded to in the complaining juror's note to the court.

STANDARD OF REVIEW

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part that on motion of a defendant the court may grant a new trial "if required in the interest of justice." Decisions on motions for new trial are within the sound discretion of the trial judge. *Burks* v. *Egeler*, 512 F.2d 221, 224 (6th Cir. 1975), *cert. denied*, 423 U.S. 937, 96 S.Ct. 297, 46 L.Ed.2d 270 (1975). Motions for new trial are not favored and should be granted only with great caution and in the most extraordinary of circumstances. *United States* v. *Garner*, 529 F.2d 962, 969 (6th Cir. 1976), *cert. denied*, 426 U.S. 922, 96 S.Ct. 2630, 49 L.Ed.2d 376 (1986) and 429 U.S. 850, 97 S.Ct. 138, 50 L.Ed.2d 124.

ANALYSIS

In defendants' motion for new trial, defendants make two arguments: 1) that the jury possibly was prejudicially influenced by television news reports which were

broadcast during the jury's deliberations and that such prejudicial influence possibly resulted in actual bias against the defendant on the part of the jury, and 2) that a note from a juror to the court indicated that members of the jury possibly were being influenced by forces extraneous to the jury's deliberations and that such forces possibly caused actual bias. The court disagrees with both of defendants' arguments.

I.

The remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. *Smith* v. *Phillips*, 455 U.S. 209, 215, 102 S.Ct 940, 944-45, 71 L.Ed.2d 78 (1982). The defendant has the burden of proving that any unauthorized communication with jurors resulted in actual juror bias. *United States* v. *Pennell*, 737 F.2d 521, 532 (6th Cir. 1984).

In the case at hand, the defendants' concerns that the jury may have been exposed to unfavorable publicity as to one of defendant Patrick Rugiero's trial counsel, were brought to the attention of the court prior to the jury returning a verdict. The court immediately responded to defendants' concerns by holding a meeting in chambers between the court and the parties, wherein it was agreed that the jurors were to be questioned regarding their exposure to the publicity, if any, after verdicts had been reached. Consequently, when the jury returned with its verdicts, the jurors were questioned by the court as to whether they had seen or heard of the publicity. All jurors indicated either that they had seen the publicity but had not been influenced by it, or that they had not seen it. In fact, as noted above, two of the jurors spoke to the court of their admiration for the trial counsel in question.

The court finds that the questioning of the jurors as to the effect, if any, of the publicity was sufficient to satisfy the requirement that a hearing be held when a defendant alleges juror bias. The court questioned the jurors at the time of trial and discovered nothing in their answers that would indicate bias. Defendants' motion for new trial presents no new factual issues to be considered in a hearing.

Where a district court views juror assurances of continued impartiality to be credible, the court is entitled to rely upon such assurances in deciding whether a defendant has satisfied the burden of proving actual prejudice. *United States* v. *Pennell*, 737 F.2d at 533. In the case at hand, the court finds, as it did at the time of questioning the jurors, that the jurors' answers are sufficient to satisfy the court that no juror bias resulted from the publicity on defendant Patrick Rugiero's trial counsel.

The fact that the publicity did not pertain to the defendants' case itself, either directly or indirectly, but rather related to extraneous matters involving one of defendant Patrick Rugiero's trial counsel is further evidence of the propriety of relying upon the credibility of the jurors' assurances. In *United States* v. *Porcaro*, 648 F.2d 753, 757 (1st Cir. 1981), the court established a three pronged test to determine whether a trial jury had been prejudiced by publicity: 1) was the publicity of a prejudicial nature?; 2) if so, were any of the jurors exposed to the news coverage?; and 3) if exposure occurred, did it affect the jury's impartiality? Defining "prejudicial" in this context, the First Circuit, in a case subsequent to its *Porcaro* decision, considered important the fact that the jurors were not exposed to any substantive information on the issues at trial or on the defendants' guilt with respect to the charges against them. *United States* v. *Angiulo*, 897

F.2d 1169, 1186 (1st Cir. 1990). *See also*, *United States* v. *Gaggi*, 811 F.2d 47, 52 (2d Cir. 1987). Thus, the fact that the publicity was not related to any issue at trial in defendants' case combined with the jurors' assurances that no influence or actual bias resulted from the publicity leads the court to conclude that the jury was not made biased by the publicity.

II.

Defendants' second argument is that a note submitted by a juror indicated that the jurors were being influenced by extraneous forces. The court disagrees. The contents of the note were as follows:

> Many stated they knew from the first day their verdict. Judge Gadola I totally disagree with count 2 verdict for first defendant. The verdicts were not based on impartial decisions by the majority of the jury. Many focused there [*sic*] decisions on the fact that whether they will walk away with their hands clean or not. Based on one person's notes not their own. Several had the feeling that the government didn't present a sufficient case to convict either of them. Many went along with the majority to keep down arguments. Many stated this is bullshit we don't want to be jurors any longer. Let's just get it over with. I have not been paid off or threatened. Just had uneasy feelings the way this decisions [*sic*] were handled. A new jury should be picked.

The note makes no reference to any extraneous factors influencing the jury in its deliberations.[2] Rule 606(b) of

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[2] **In fact, the claim that many knew from the first day what their decisions would be undermines defendants' claim that the jurors were influenced and actually biased by news reports that did not occur until the jury's second day of deliberations.**

the Federal Rules of Evidence makes it clear that the jury's deliberations are not to be investigated or questioned so long as no extraneous prejudicial information or outside influence was brought to bear upon any juror. Furthermore, the author of the note later asked that the note be disregarded. Additionally, as above set forth, the juror was questioned individually during polling, as was each juror, and did not indicate that either the television news item concerning defendant Patrick Rugiero's counsel or any extraneous prejudicial information or any outside influence had been brought to bear upon herself or had caused any prejudice or bias or had any effect whatsoever upon the jury's deliberations. All the jurors, when questioned individually and out of the hearing of one another, concurred.

Defense counsel have urged that the Sixth Circuit Court of Appeals, in *U.S.* v. *Pennell*, 737 F.2d 521, 531-533 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985) was in error in ruling that the United States Supreme Court in *Smith* v. *Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) had reinterpreted *Remmer* v. *United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954)[3] now holding that where it is shown that a jury was exposed to extraneous information, the burden of proof is on the defendant to demonstrate actual juror partiality. This court disagrees with defendants' contentions and observes that the Sixth Circuit has reaffirmed its ruling in *Pennell* in such subsequent cases as *United States* v. *Zelinka*, 862 F.2d 92, 95-96 (6th Cir. 1988).

The burden of proof is indeed on the defendant to demonstrate actual juror bias or prejudice from

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[3] *United States* v. *Remmer* was again reviewed by the Supreme Court at 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956), in which the original conclusion was again enunciated.

extraneous prejudicial information, or improper outside influence.

But even if it be assumed that there is a presumption of such resultant bias or prejudice, with the government having the burden to overcome the presumption, in this case the ruling necessarily would be that the government had even met that burden. The juror who sent the note, and all jurors, were closely questioned, individually and out of the hearing of fellow jurors, and all of them attested that no extraneous information had influenced their deliberations or verdicts. Further, all confirmed that no improper outside influence had been brought to bear upon any of them.

Defendants were given the opportunity, at the hearing held October 6, 1992, to produce testimony from the juror who submitted the notes, or from any other jurors, to support their claim that either any extraneous prejudicial information had been improperly brought to the jury's attention or that any outside influence had been improperly brought to bear upon any juror, thereby resulting in bias against the defendants. Defendants have produced no such testimony nor any supporting affidavits nor any evidence whatsoever of any such bias or prejudice to the defendants and defense counsel, on October 6, 1992, advised the court that they did not propose to submit any such testimony or evidence on the limited matters on which such testimony or evidence is permitted under Fed.R.Evid. 606(b). They rely instead only on speculation and conjecture, as to the jury's deliberations, and upon matters barred by Fed.R.Evid. 606(b), and have entirely failed to meet their burden of proving any actual juror bias whatsoever.

The court finds therefore that the juror's note, unsupported by any evidence whatsoever, created no

issue as to whether extraneous forces acted upon the jury to cause any actual bias.

ORDER

Therefore, it is hereby ORDERED that defendants' motion for a new trial is DENIED.

SO ORDERED.

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-
ELECTRONIC CITATION: 1994 FED App. 0091P (6th Cir.)
File Name: 94a0091p.06

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed March 22, 1994)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PATRICK RUGIERO (92-2412); ARA BASMAJIAN (92-2414), Defendants-Appellants — Nos. 92-2412/2414; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MERRITT, Chief Judge; SUHRHEINRICH, Circuit Judge; and WELLFORD, Senior Circuit Judge.

WELLFORD, Senior Circuit Judge, delivered the opinion of the court, in which SUHRHEINRICH, Circuit Judge, joined. MERRITT, Chief Judge (p. 16), delivered a separate dissenting opinion.

HARRY W. WELLFORD, Senior Circuit Judge.

Two of a number of defendants charged in an indictment for conspiracy to possess and distribute cocaine and heroin (or other specific substantive dealing in these drugs), using and carrying a weapon in relation to their drug dealing and a crime of violence, and also for threatening a witness, now appeal their convictions. After an extended trial, Patrick Rugiero ("Rugiero") and Ara Basmajian ("Basmajian")[1] raise a number of issues. The district court denied motions for a new trial and then assessed substantial sentences against these two defendants.[2]

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[1] We use the name as reflected in the indictment and in the defendant's brief. It is sometimes spelled "Basmadjian."

[2] Anthony Rugiero, Patrick's brother, was found not guilty of the two counts charged against him; Patrick was also acquitted of one drug count, one weapon count, and the witness threatening count.

The government charged that beginning in 1985, in southeast Michigan, Rugiero was the leader of an armed drug distribution ring, and that Basmajian was one of the participants in the illegal group. Basmajian and his family owned and operated a party store in Dearborn Heights, allegedly used as a site to store and distribute drugs. Rugiero and his brother, Anthony, allegedly employed violent means, including threatened firearm use, to collect drug debts.

There was evidence of undercover drug contacts with defendants over a period of time, principally involving substantial quantities of cocaine. Others involved in drug transactions testified as to participation of defendants in distribution of both cocaine and heroin.

I.
ARA (ART) BASMAJIAN

Basmajian was charged with and convicted on two of the eight counts of the indictment, conspiracy to distribute drugs, and aiding and abetting one substantive heroin offense.

A. JURY MISCONDUCT

Basmajian (and Rugiero) assert that a television report tying Rugiero's trial counsel to "organized crime" figures came to the attention of the jury during its deliberations prejudicing both defendants and necessitating a mistrial. The defendants brought their concerns promptly to the district court. The controversy centers, in part, around a note from the jury about the time it initially indicated a verdict had been reached.[3] The

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3 The note contained, among other things, the following comments: "Many stated they knew from the first day their verdict."

. . .

(*concluded on page A-50*)

defendants requested an inquiry of the person who wrote the note. Very soon after sending the first note, the jury returned its verdict together with another note to this effect: "Disregard note. A unanimous decision has been reached." The district judge declined the request to make a juror inquiry at that time and accepted the guilty verdicts, now the subject of appeal, over the defendants' objections.

Despite his earlier indication, the trial judge then made separate individual inquiries of each juror about the television report regarding Rugiero's attorney. Most of the jurors indicated that they had seen or heard about the television report or reports. Some jurors indicated that the jury foreman, Mayhew, had discussed the television information about Rugiero's attorney with other jurors. Mayhew herself, however, denied knowledge of the television report or discussing this matter with other jurors. Each juror denied any adverse influence on their verdict, and the district court denied the motion for a mistrial.

The standard to be applied in assessing the district court's actions in a case of alleged juror misconduct is whether the actions (or inactions) constituted an abuse of discretion under all the circumstances. *United States* v. *Shackleford*, 777 F.2d 1141, 1145 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986). This court has articulated four points to consider in cases of possible improper juror contact:

(*continued from page A-49*)

> **"The verdicts were not based on impartial decisions by the majority of the jury."**
>
> . . .
>
> **"I have not been paid off or threatened. Just had uneasy feelings the way this decisions [*sic*] were handled."**

> Four points emerge from our decision in *Pennell*:[4] (1) when a defendant alleges that an unauthorized contact with a juror has tainted a trial, a hearing must be held; (2) no presumption of prejudice arises from such a contact; (3) the defendant bears the burden of proving actual juror bias; and (4) juror testimony at the "*Remmer*[5] hearing" is not inherently suspect.

United States v. *Zelinka*, 862 F.2d 92, 95-96 (6th Cir. 1988).

The district court in this case did conduct a hearing on the defendants' claims of jury taint. The district court properly made no "presumption of prejudice" from juror exposure to the television news relating to Rugiero's attorney and required the defendants to prove "actual juror bias." The district court noted that it and the parties, through their counsel, "agreed that the appropriate course of action [after the television broadcast at issue] would be to defer any inquiry of the jurors" until conclusion of jury deliberations and a verdict. This agreed course of action was followed. The trial judge declined to inquire in great detail of the juror who wrote the notes "since the notes gave no indication either that any extraneous prejudicial information had been improperly brought to the jury's attention or that outside influence had been improperly brought to bear on any juror," citing Fed. R. Evid. 606(b).[6] *See also Shackleford, supra*. The district court heard "individual

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4 *United States* v. *Pennell*, 737 F.2d 521,532 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

5 *Remmer* v. *United States*, 347 U.S. 227 (1954).

6 The court also noted that the note writing juror who complained about jury deliberations "indicated that her complaints . . . were not motivated by concerns of any extraneous prejudicial information brought to the jury's attention or by any outside influence."

juror's testimony and viewed their assurances of continued impartiality to be credible," as it was entitled to do under *Pennell* and *Zelinka*. *See also United States* v. *Sturman*, 951 F.2d 1466, 1477-78 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992).[7]

Even if we assume that the jury foreman was exposed to the television broadcast and mentioned it or its content to other jurors, we find no abuse of discretion on the part of the district court here. We do not presume prejudice has occurred by reason of extraneous contact with a juror or jurors. Neither Basmajian nor his counsel were the subjects of any adverse information. Basmajian concedes in his brief that "juror testimony concerning the effect of the outside communication on the minds of the jurors is inadmissible," *Stockton* v. *Commonwealth of Virginia*, 852 F.2d 740, 744 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1354 (1989), but argues that the district court should not have relied upon "unsworn and unreliable denials of influence."

As to the defendant Basmajian, we are satisfied that there was no abuse of discretion nor error committed by the district court with respect to the alleged jury misconduct issue. We also conclude that Basmajian proved no actual bias against him on the part of the jury on this record, nor was "actual prejudice" demonstrated. *See United States* v. *Griffith*, 756 F.2d 1244, 1252 (6th Cir.), *cert. denied*, 474 U.S. 837 (1985) (defendant must demonstrate that juror communications resulted in actual prejudice).[8]

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7 Two jurors during the inquiry apparently "spoke to the court of their admiration for the trial counsel."

8 The defendant cited *Budoff* v. *Holiday Inns, Inc.*, 732 F.2d 1523 (6th Cir. 1984), in support his argument. *Budoff* was a civil case and the panel presumed prejudice by reason of the direct contact attempted by trial counsel's assistant to a juror. We deem *Budoff* distinguishable on its facts.

B. SEVERANCE

The principal basis for Basmajian's motion for a separate trial was the existence of charges against two of his alleged co-conspirators, the Rugiero defendants, with respect to possession and/or use of firearms and intimidating and threatening a witness. We observe first that the jury acquitted the Rugiero brothers of both these charges. The jury was evidently able to separate the proof and evidence regarding the different defendants and different charges set out in the indictment. We believe that the district court was not in error in denying the defendant's severance motion. The counts against the three defendants, particularly the two appellants now before us, were "logically interrelated and involve[d] overlapping proof." *United States* v. *Swift*, 809 F.2d 320, 322 (6th Cir. 1987). We presume, unless the defendant carries a strong burden of showing to the contrary, that the jury is "capable of sorting out evidence and considering each count and each defendant separately." *Id.* at 323. The defendant has failed to show an abuse of discretion in denying him a separate trial. *See United States* v. *Warner*, 971 F.2d 1189 (6th Cir. 1992); *United States* v. *Sivils*, 960 F.2d 587 (6th Cir.), *cert. denied*, 113 S. Ct. 130 (1992); *United States* v. *Gallo*, 763 F.2d 1504 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068 (1986); *United States* v. *Krebs*, 788 F.2d 1166 (6th Cir.), *cert. denied*, 479 U.S. 930 (1986).

C. SINGLE OR MULTIPLE CONSPIRACIES

When the case was submitted to the jury, Basmajian had the opportunity to argue whether the proof, if any, of his part in any conspiracy to deal drugs indicated a separate conspiracy from that charged against him in the indictment. He did not request a jury instruction on multiple conspiracies. We consider this claim, therefore, only on a basis of plain and clearly prejudicial error. In

respect to this issue, the defendant can prevail only if he shows that the evidence presented could "reasonably be construed *only* as supporting a finding of multiple conspiracies" rather than the conspiracy charged. *United States* v. *Rios*, 842 F.2d 868,872 (6th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989) (emphasis added) (quoting *United States* v. *Warner*, 690 F.2d 545, 548 (6th Cir. 1982)). *Rios* indicates further that a single conspiracy is not converted into multiple conspiracies merely because there may be some changes in persons involved or because they play different roles. *See also United States* v. *Bates*, 600 F.2d 505, 509 (5th Cir. 1979). We believe the defendant has not prevailed in his burden to establish clear error and a fatal variance in this case.

Each member of a conspiracy need not be shown to know each other or to have direct association with all other conspirators. *United States* v. *Sanchez*, 928 F.2d 1450, 1457 (6th Cir. 1991). The proof indicated that Basmajian knew of the existence of others in the charged drug conspiracy. *See United States* v. *Christian*, 786 F.2d 203, 211 (6th Cir. 1986). Once the existence of a drug conspiracy, as charged, has been shown, proof of a formal agreement is unnecessary. A tacit or mutual understanding and a showing of knowing and active participation by a defendant in some act or portion of the conspiracy is all that is required. *United States* v. *Lee*, 991 F.2d 343, 347-48 (6th Cir. 1993).

> The fact that a conspiracy can be divided into distinctive sub-groups does not mean that there is more than one conspiracy. As long as the different sub-groups are committing acts in furtherance of one overall plan, the jury can still find a single, continuing conspiracy.

United States v. *Warner*, 690 F.2d 545, 550 n. 8 (6th Cir. 1982).

We find no merit in the claim of variance. The jury had sufficient evidence to decide whether Basmajian was simply a seller or whether he was a conspirator, or aider and abettor in distribution of illicit drugs.

D. SENTENCE

Basmajian was found responsible for two kilograms of heroin by the sentencing judge, who noted that the evidence clearly showed that Basmajian was the source of this quantity being distributed by Rugiero. The district court also found evidence of this defendant's dealing in three kilograms of cocaine from at least two sources. The district court specifically overruled Basmajian's objections to the quantities of contraband attributed to him in the presentence report. We accept the findings of the district court in this respect unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts. *United States* v. *Walton*, 908 F.2d 1289, 1300-01 (6th Cir.), *cert. denied*, 498 U.S. 906 (1990). We find no error in attributing to Basmajian the entire two kilos of heroin negotiated for, although only one-half kilo was actually delivered to Basmajian's store.

Accordingly, we **AFFIRM** Basmajian's convictions and sentence in all respects.

II.

PATRICK RUGIERO

A. JURY MISCONDUCT

As well might be expected, Rugiero attacks the failure of the district court to grant a mistrial on the jury misconduct issue discussed heretofore. Rugiero has a stronger basis for a challenge on this ground, although he was acquitted on three of the five counts with which he was charged in the superseding indictment, while

Basmajian was convicted on both charges made against him.

Despite the fact that Rugiero's attorney was the specific subject of the adverse information contained in the television reports, we reach the same result on this issue. The jury evidently disregarded any information they may have heard about Rugiero's counsel — they acquitted Rugiero and and his brother Anthony on three counts.

B. NON-SEQUESTRATION OF GOVERNMENT WITNESS MILEWSKI

The district court directed sequestration of witnesses upon this defendant's motion. During cross-examination of Thomas Wyman, who defendant describes as a "key government witness," Keith Milewski, who had been subpoenaed by the government, entered the courtroom and heard part of Wyman's testimony for some forty-five minutes. Over two weeks later, the government called Milewski as a witness and he was permitted to testify over Rugiero's objection.

The statutory purpose of the rule requiring sequestration of witnesses is to preclude coaching or the influencing of a witness' testimony by another witness. *United States* v. *Gibson*, 675 F.2d 825, 835 (6th Cir.), *cert. denied*, 459 U.S. 972 (1982). Although the government was permitted more than one law enforcement agent to be present in the courtroom, no one detected Milewski's courtroom presence until some time had elapsed. The defendant maintains that on May 21, Milewski indicated that he had no personal knowledge about the defendant's alleged drug operations.

The district court held that Milewski was not disqualified from testifying because: (1) the government did not consent, connive, procure Milewski's presence; (2) the

government did not have active knowledge that Milewski was in the courtroom during a part of Wyman's cross-examination; and (3) the witness had no knowledge of Wyman or any matters relating to Wyman. The defendant does not actually claim that the government permitted, encouraged, or approved of Milewski's coming into the courtroom. Rather, the defendant contends that because the government subpoenaed Milewski and instructed him to come to the courthouse during the trial, the district court should have held the government accountable for his going into the courtroom for a portion of a government witness' testimony and erred in not barring his testimony. It appears that Milewski initially denied knowledge of the defendant's drug activities, but upon his return after May 21, upon governmental urging and assurances of immunity, Milewski agreed to testify. While the government counsel may not have revealed all the details in arguing the defendant's motion to exclude Milewski's testimony, we are satisfied that the district court, under all the circumstances, in the absence of any government collusion, did not abuse its discretion in permitting him to testify despite his being in the courtroom during earlier testimony.

The fact that Milewski also spoke to co-defendant Jamil Ahmed, with the government's cooperation, while the latter was in the course of his testimony, presents a more difficult problem. Milewski indicated in his direct testimony that he had changed his mind about implicating himself and Rugiero in drug activities after talking to codefendant Ahmed and speaking with his lawyer. We recite the pertinent portions of the government's brief in this regard:

> The prosecutor explained that he had planned to have Milewski meet with Ahmed before

Ahmed testified, but Milewski failed to appear. The prosecutor did not consider his actions to be a circumvention of the sequestration order. When Milewski finally showed up, the prosecutor planned to demonstrate to Milewski that he had a witness who would implicate Milewski in an effort to persuade Milewski to seek counsel before making any decisions. The prosecutor explained that he was present during the discussion with Ahmed, and that the discussion did not include the fact that Ahmed had testified. . . . As he explained, "The representations made by Ahmed, while they were made after his testimony, could have been said the day before, the week before, the month before. There was no review of Ahmed's testimony."

. . .

Milewski's description of his meeting with Ahmed demonstrated that its purpose was not to inform Milewski of the testimony that had occurred in the trial, but to help him understand his potential criminal liability so as to encourage him to obtain legal counsel before making any decisions that might lead to perjury charges.

. . .

In the fifteen to twenty minute conversation with Ahmed, Ahmed reminded Milewski that they had met before. He then told Milewski "[Y]ou're in this now, the only way that you're going to get out of this is by telling them the truth, tell them what happened with you and Pat, and what happened with me and you." Ahmed told him to tell the truth or he cold [sic] get caught for perjury. . . . Milewski asked Ahmed if he had been caught with dope. Ahmed responded "no" and explained

> to him how conspiracy law worked. Milewski explained that prior to Ahmed's explanation he had believed he could not be charged unless he was actually caught with dope. At that point, Milewski asked for legal counsel, all questioning stopped, and the prosecutor instructed him on how to obtain free legal counsel.
>
> . . .
>
> Milewski understood Ahmed's statement to mean he had not yet testified[9] . . . Milewski admitted that but for the meeting with Ahmed, he probably would have perjured himself on the stand.

The government's arranging of a meeting between a prospective witness and a witness who was in the process of cross-examination risked a violation of the spirit, if not the letter, of the exclusion of the witness rule. The defendant moved for a mistrial by reason of these circumstances behind Milewski's testimony, claiming "an improper circumvention of Rule 615," and "a violation of the Court's order on sequestration."

After a hearing and some reflection, the district court made the following finding:

> The record seems now to be clear that — that Ahmed did not relate any of his testimony to

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9 Defendant Rugiero alleges that Ahmed told Milewski "his 'name was brought up there' [at trial]." . . . The record, however, reflects that Milewski stated that defense counsel LaRene, not Ahmed, told him this:

> **Q. [MR. LARENE]: And also that this was the testimony that [Ahmed] either had given or was going to give in this trial?**
>
> **A. [Milewski]: You told me that my name was brought up there.**
>
> **Q. Well, no, no, no. Mr. — Mr. Milewski —**

> Milewski. In fact, Milewski didn't even know that he had been a witness, but suspected or — or — speculated that perhaps he might be called, at a later point in the trial, to be a witness.
>
> So under those circumstances and in further light of the fact that there was no specific request made to, in this case, to bar a — a witness from discussing with another witness after he leaves the courtroom, his testimony — I don't think that's the major reason for my ruling, . . .
>
> Basically, it is, however, a slight factor, but the major point in my ruling is that I — I don't find that Ahmed did relate to Milewski what his testimony had been in this case, and therefore, under those circumstances and on the basis that the case law that I — to which I have referred, I'm going to deny the defense motion in that regard.

We are not persuaded by the defendant's vigorous argument that because the government subpoenaed Milewski in, the government, by reason of that fact, triggered all the following problems involving the sequestration rule. Neither are we satisfied by the government's self-serving explanation and claimed justification for bringing Milewski and Ahmed into face-toface contact. The government, to be sure, had a right to require Milewski's presence at the courthouse as one who purportedly had relevant information about the indictment charges and it had a right to discuss with him what he knew about the alleged conspiracy and the defendants on trial. Bringing witnesses together in this fashion, especially without the court's consent, comes very close to a per se violation of this ancient and important rule of sequestration. But even if we count this as a violation, especially when coupled with Milewski's prior presence during another witness' testi-

mony, "[t]he controlling principle in this Circuit is that violation of an order directing that witnesses be separated does not automatically bar a witness' testimony." *Gibson*, 675 F.2d at 835-36. During trial, the district court was fully apprised of the circumstances of Milewski's testimony and the government's part in, at least, a violation of the spirit of the sequestration rule and order. In order to grant a new trial, we must find that the district court not only abused it discretion, but also that the court's error was prejudicial to the defendant's receiving a fair trial. *Gibson*, 675 F.2d at 835-36. We are not persuaded that the defendants have established these requirements in light of the substantial other similar evidence, equivalent to Milewski's testimony, and the wide discretion given the district court in making such a ruling. *See United States* v. *McClure*, 734 F.2d 484, 495 (10th Cir. 1984.). Finally, we find no clear error in the factual determinations on this issue made by the district court, although we think it unnecessary, once the rule is invoked, that either party need ask the court to instruct each witness not to discuss his testimony with another witness yet to testify.[10]

Although this issue is a close one, we find no prejudicial error in the district court's rulings on Milewski's testimony.

C. CRAFT'S TESTIMONY ABOUT RUGIERO'S SEEKING TO KILL A FEDERAL AGENT

Rugiero asserts error in permitting witness Nathaniel Craft to testify about a conversation in which he allegedly inquired whether Craft would "take out" a fed-

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10 **Attorneys know, without such construction, that witnesses who have testified when the sequestration rule is in effect should not discuss the substance of their testimony with a witness who has not yet given testimony. The role is designed to prevent "tailoring testimony." *Gibson*, 675 F.2d at 836.**

eral agent. Rugiero objects to Craft's being "improperly called before the grand jury" about this incident after Rugiero was indicted on the charges subject to this appeal. He also claims this post-indictment conversation violated his right to counsel and that such evidence was unduly and unfairly prejudicial. In essence, Rugiero claims that calling Craft before the grand jury was an abuse of its process because no new indictment followed this testimony, and this procedure was used improperly to "anchor the testimony of the witness." We find no error, under the circumstances, in the district court's finding that the government had a legitimate purpose in calling Craft before the grand jury. "So long as it is not the sole or dominant purpose of the grand jury to discover facts relating to a defendant's pending indictment, the Court may not interfere with a grand jury's investigation." *United States* v. *George*, 444 F.2d 310, 314 (6th Cir. 1971). The burden is on Rugiero to demonstrate that there are in fact irregularities. "The law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *United States* v. *R. Enterprises*, 498 U.S. 292, 300 (1991). Craft did testify about pre-indictment matters, but he also gave substantial testimony about threats to a government agent after the indictment. We do not conclude that Rugiero has shown a wrongful "dominant purpose" in this regard.

The district court found that Rugiero had initiated the conversation with Craft and that the government had not arranged the meeting. While the testimony in question was doubtless prejudicial to Rugiero, we cannot say the district court was clearly in error or abused its discretion in admitting this evidence. The district court is granted considerable deference in deciding difficult Fed. R. Evid. 404(b) matters and weighing relevance versus undue prejudice. The jury

did not convict Rugiero on the violence or weapon counts. We find this challenge also to be without merit under all the circumstances.

We have considered carefully all the contentions of the defendant Rugiero. As in the case of co-defendant Basmajian, we are not persuaded that any reversible error has been demonstrated.

We, accordingly, **AFFIRM** the respective convictions and sentences.

MERRITT, Chief Judge, dissenting.

I would reverse Rugiero's conviction because of the prosecutor's violation of the sequestration rule. The Court is right to suggest that the prosecutor obviously violated the rule by not keeping Milewski out of the courtroom while under subpoena to testify and by staging a confrontation and conversation between him and a witness who was testifying. The obvious purpose of this confrontation was to get Milewski to testify in a way that would be consistent with the testimony of the witness who was then on the stand, The witness on the stand told Milewski facts that the government wanted Milewski to testify to, Milewski then did so testify. This is too much of a violation to condone or to sweep under the "harmless error" rug. We are always reluctant, as we should be, to set aside a verdict on a technicality when it is fairly clear that the defendant is guilty and may have been convicted anyway. But if prosecutors know that in such circumstances we will always overlook egregious transgressions they will then have no incentive to play ball by the rules, The "war on drugs" of the last decade has emboldened many prosecutors to believe that they are immune from normal rules of procedure in criminal cases. In our zest to

incarcerate, we are in danger of losing the rule of law. This is such an obvious and notorious violation in this case that I would reverse and remand for a new trial.

ORDER DENYING PETITION FOR REHEARING EN BANC AND PETITION FOR REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed May 5, 1994)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PATRICK RUGIERO, Defendant-Appellant — No. 92-2412)

BEFORE: MERRITT, Chief Judge; SUHRHEINRICH, Circuit Judge; and WELLFORD, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

TRANSCRIPTIONS OF *RADIO TV REPORTS*
FROM NEWSBEAT INVESTIGATION DATED JUNE 17, 1992 AT 6:00 P.M., AND NIGHTBEAT FEDERAL INVESTIGATION DATED JUNE 17, 1992, AT 11:00 P.M

RADIO TV REPORTS
42400 GRAND RIVER AVENUE, SUITE 110
NOVI, MI 48375 • (313) 344-1177 • FAX (313) 344-1730

FOR: BUFALINO AND PALAZZOLO
PROGRAM: Newsbeat *STATION:* WDIV-TV
DATE: June 17, 1992 6:00 pm *CITY:* Detroit

NEWSBEAT INVESTIGATION

EMERY KING: A Newsbeat investigation has revealed tonight that a well-known Detroit attorney is the target of a federal investigation, in a story you'll see only on Four, several sources tell the Newsbeat that the case involves the attorney's dealings with a client who has been tied to organized crime. Our Chris Hansen has that story.

CHRIS HANSEN: Deday Larene is the most prominent criminal defense attorneys [*sic*] in the Detroit area, now numerous well-informed sources say he has become a target himself of a federal criminal investigation. The case involves one of his former clients, long tied to gambling and organized crime, Vito "Billy Jack" Giacalone. Giacalone just recently got out of federal prison, according to sources familiar with the investigation, the feds have evidence that Larene helped engineer a business deal for Giacalone in which a substantial amount of money was hidden from the Internal Revenue Service. When I approached Larene today on the investigation he refused to comment

Sources close to the case have indicated to the Newsbeat that the investigation is completed and that the feds are just now waiting until Deday Larene finishes up

with a trial now going on here in federal court. Ironically some of the federal evidence in the case, was, according to sources, provided by this man Emmett Denha (?), Denha recently pleaded guilty in a huge sports betting case and agreed to cooperate with the feds in exchange for lenient sentencing, Denha's store was allegedly used to launder some of the money involved in Giacalone's questionable financial deal. Deday Larene also represented Giacalone's son, Jackie Giacalone, who recently pleaded guilty in the same sports betting case in which Denha was originally indicted.

We tried to contact U.S. attorney Steven Markman on this story today. We got in touch with him but he refused to confirm or deny the scenario, but the Newsbeat has learned that Larene has apparently contacted a high-powered law firm in Washington, D.C., famous for its criminal work. That to help him in this investigation. Emery.

KING: All right Chris, thank you. Chris Hansen reporting live tonight from the federal building in downtown Detroit.

RADIO TV REPORTS
42400 GRAND RIVER AVENUE, SUITE 110
NOVI, MI 48375 • (313) 344-1177 • FAX (313) 344-1730

FOR: BUFALINO AND PALAZZOLO
PROGRAM: Nightbeat *STATION:* WDIV-TV
DATE: June 17, 1992 11:00 pm *CITY:* Detroit

FEDERAL INVESTIGATION

NEWSCASTER: A well-known Detroit-area criminal defense attorney soon may be on the defensive himself. The Nightbeat's Chris Hansen has learned that Deday Larene is the target of a federal investigation. Larene has represented a large number of alleged organized crime figures, sources say federal agents have evidence Larene helped engineer a business deal for Vito "Billy Jack" Giacalone, in which a large amount of money was hidden from the IRS. Larene refused to comment on the report, but sources say he may ask a Washington law firm to defend him if needed.